82-56

Docket No.

FILED

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1982

PEARLIE SIMMONS,
Petitioner

v.

SEA-LAND SERVICES, INC.,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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See Inside Covers For Cases Continued

MELVIN BANDY, For and on behalf of himself, individually, and
AMERICAN MUTUAL INSURANCE COMPANY of BOSTON,
Petitioners,

v.

BANK LINE, LTD.,
Respondent.

FRED L. SPRATLEY, For and on behalf of himself, individually and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

HELLENTIC LINES, LTD.,
Respondent.

THOMAS E. McLEAN, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

CIA TRANSATLANTIC ESPANOLA, S.A.,
Respondent.

CHARLES A. CALDWELL, and
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

OGDEN SEA TRANSPORT, INC.,
Respondent.

WALLACE CURRY, and
ATLANTIC AND GULF STEVEDORES, INC.,
Petitioners,

v.

COMPANIA CRASATLANTICA ESPANOLA, S.A.,
Respondent.

WILBERT C. HAROLD, For and on behalf of himself, individually,
and
THE HARTFORD ACCIDENT INDEMNITY INSURANCE COMPANY,

v.

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Respondent.

IN THE
SUPREME COURT OF THE
UNITED STATES

Pearlie Simmons,
Petitioner
v.
Sea-Land Services, Inc.,
Respondent.

Melvin Bandy, for and on behalf of
himself, individually, and
American Mutual Insurance Company of
Boston,
Petitioners,
v.
Bank Line, Ltd.,
Respondent.

Fred L. Spratley, for and on behalf of
himself, individually, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
Hellentic Lines, Ltd.,
Respondent.

Thomas E. McLean, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
CIA Transatlantic Espanola, S.A.,
Respondent.

Charles A. Caldwell, and
Commercial Union Insurance Company,
Petitioners,
v.
Ogden Sea Transport Inc.,

Respondent.

Wallace Curry, and
Atlantic and Gulf Stevedores, Inc.,
Petitioners
v.
Compania Crasatlantica Espanola, S.A.,
Respondent.

Wilbert C. Harold, for and on behalf of
himself, individually, and
The Hartford Accident Indemnity
Insurance Company,
Petitioners,
v.
Companhia De Navegacao Maritima Netumar,
Respondent.

QUESTIONS PRESENTED

I. Does the mere initiation of payment of compensation by an employer and acceptance of that initial compensation by a longshoreman constitute an "award in a compensation order filed by the deputy commissioner", where the only action by the deputy commissioner has been to file the employer's notice that compensation has been started?

II. Once the statutory assignment of 33 U.S.C. §933(b) has occurred and the employer possesses full control over the claim against the third party, may the employer voluntarily reassign to the longshoreman the right to sue?

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Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 12, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit in the instant matter is reported as Simmons v. Sea-Land Services Inc., 676 F.2d 106 (4th Cir. 1982), and is reprinted in the Appendix to this petition.

The opinion of the district court in Bandy v. Bank Line Ltd., is reported at 518 F.Supp. 1229 (E.D. Va. 1981), and is reprinted in the Appendix to this petition. The other opinions of the district court in the other consolidated cases herein are not reported, but are reprinted in the Appendix to this petition.

JURISDICTION

The opinion of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered on April 21, 1982 and this petition for certiorari is filed within ninety days of that date.

No petition for rehearing has been filed in the Court of Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

Federal jurisdiction in the district courts in the instant matters existed pursuant to 28 U.S.C. §1332.

STATUTORY PROVISIONS INVOLVED

33 U.S.C §933(b): Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

STATEMENT OF THE CASE

Each of the instant cases involves a longshoreman who was injured on the

job and who initially accepted compensation without contravention by the respective employer. Disputes later arose as to the entitlement of some of the longshoremen to additional compensation benefits. Each longshoreman later brought an action against an allegedly negligent shipowner. In each case the district court concluded that the plaintiff had received "an award in a compensation order" more than six months prior to the institution of his suit, and that pursuant to 33 U.S.C. §933(b), the plaintiff no longer retained the right to sue the shipowner. The district court entered summary judgment in favor of the defendant in each case.

Each longshoreman filed his action more than six months after compensation payments were initiated. As the Court of Appeals noted, however, the pattern

of payments varied from case to case. Longshoremen Bandy, Caldwell, Curry, and Harrold, filed their actions more than six months after receiving their last compensation payments; none of them ever received a formal award. Longshoreman Simmons filed his action while receiving payments, though the payments had once been interrupted when he attempted to return to work; he did not receive a formal award. Longshoreman McLean filed his action while receiving compensation payments, but after the filing date he received a formal award of permanent total disability. Longshoreman Spratley filed his action while receiving payments and within six months of a formal order of permanent total disability. 676 F.2d at 109, n.3.

The Court of Appeals for the Fourth Circuit concluded that an award in a compensation order does not require

formal entry of an award in an order. Instead, the Court decided that an "informal award" would be sufficient to trigger the assignment provision of Section 33(b), relying upon the Fourth Circuit's prior decision in Liberty Mutual Insurance Company v. Ameta & Company, 564 F.2d 1097 (4th Cir. 1977). Thus, the Court of Appeals held that "an award in a compensation order" is created by the completion of three events:

> "(1) The employer, having not contravened its liability, initiates compensation payments to the longshoreman; (2) the deputy commissioner files the employer's notice that compensation payments have been initiated; and (3) the longshoreman accepts any of the payments." 676 F.2d at 109.

In addition, the Court of Appeals held that once the statutory assignment took effect, the employer could not

voluntarily reassign to the longshoreman the right to sue the third party. The Court of Appeals therefore affirmed the district court judgments against each of the instant longshoreman.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

This Court recently decided in Rodriguez v. Compass Shipping Co., Ltd., 68 L.Ed. 2d 472 (1981), that Congress provided that a longshoreman loses all right to proceed against a negligent third party unless the longshoreman files suit within six months of acceptance of compensation "in an award in a compensation order filed by the Deputy Commissioner." In Rodriguez, this Court did not have before it and did not decide what constituted an award in a compensation order. In fact, this Court's grant of certiorari in Rodriguez

specifically did not extend to consideration of that question, though the petitioners in Rodriguez had sought such review. For the purposes of its decision, the Rodriguez court assumed that there had been awards so as to trigger the assignment provision of §33(b) of the Longshoremen's Act. Id. at 477, n.3. Thus, the Supreme Court opinion in Rodriguez is not useful in resolving the question of what is an award. Theodore v. Moore McCormack Lines Inc., 516 F.Supp. 25 (S.D. N.Y. 1981).

For purposes of its Rodriguez decision, this Court assumed that acceptance of compensation as made by the Rodriguez petitioners operated as an assignment. The petitioners in Rodriguez had accepted compensation in settlements of compensation claims, which were embodied in settlement

agreements signed by the plaintiff, his attorney, the employer's representative, and the Labor Department's claims examiner. See Rodriguez Court of Appeals Opinion, 617 F.2d 955, 957 (2d Cir. 1980). The Court of Appeals for the Second Circuit had held in Rodriguez that "an agreement settling an injured employee's claim to workmen's compensation signed after an informal conference with a claims examiner, by whom it was approved, constitutes an "award" within the meaning of §33(b)." Id. at 959. This definition of "award" was not disturbed by the Supreme Court on certiorari.

The result of the Second Circuit's rule was that longshoremen had at least the opportunity to consider the full compensation they would be receiving from their employers and to realize the full extent of the limited compensation

recovery before the six month period of limitation began to run. Such longshoremen would have received a copy of the settlement agreement and would know that their rights to compensation had been terminated. Any decision to sue a third party then could be made with full knowledge of all the rights and limitations afforded by the compensation remedy.

A review of the various provisions of §33(b) since the original enactment of the Longshoremen's Act in 1927 shows that Congress had a specific intention when it wrote the language contained in that section. Originally that section provided that acceptance of compensation worked an automatic assignment of the right to sue a third party. Congress amended this section in 1938 to provide that acceptance of compensation "under an award in a compensation order filed

by the Deputy Commissioner" worked an assignment of a longshoreman's right to sue. Finally, in 1959 Congress added the language that acceptance of such compensation in an award in a compensation order filed by the Deputy Commissioner operated as an assignment unless the longshoreman filed suit within six months after such award.

Cases decided under the 1938 version of the Act clearly established that mere acceptance of compensation was insufficient to effect an assignment of the longshoreman's right to sue. The rule was clear that there had to be an actual "award in a compensation order filed by the Deputy Commissioner". The United States Supreme Court held in American Stevedore Inc. v. Porello, 330 U.S. 446 (1946) that acceptance of compensation without an award does not operate as an assignment of the

employee's right to sue a negligent third party. Numerous lower court decisions concluded that unless there was compliance with the statutory language--an actual award in an actual compensation order actually filed by the Deputy Commissioner--there was no assignment of the right to sue. See Grasso v. Lorentzen, 56 F.Supp. 51 (S.D. N.Y. 1944), aff'd. 149 F.2d 127 (2d Cir. 1945), cert. denied, 326 U.S. 743; Tartaglia v. Cunard White Star Ltd., 56 F.Supp. 55 (S.D. N.Y. 1944); Brusich v. Grace Line Inc., 56 F.Supp. 48 (S.D. N.Y. 1944); Iaria v. Silver Line Ltd., 56 F.Supp. 42 (S.D. N.Y. 1943); Cupo v. Isthmian Steamship Company Inc., 56 F.Supp. 45 (S.D. N.Y. 1941); Roeben v. United States, 113 F.Supp. 732 (D. N.J. 1953).

The Court of Appeals for the Fourth Circuit in Simmons has

dramatically rewritten the definition of "award in a compensation order." In its Simmons opinion the Fourth Circuit has held that an award in a compensation order is created by the completion of three events. All that is necessary to create an award is that the employer initiate compensation payments to the longshoreman, the deputy commissioner file the employer's notice that compensation payments have been initiated, and the longshoreman accept any of the compensation payments.

The Fourth Circuit has focused solely on the word "award" and has completely ignored the phrase "in a compensation order." In creating its concept of "informal award," the Fourth Circuit has overlooked the additional requirement that there be a "compensation order." It seems indeed that the Fourth Circuit has called

Congress back into session "to cancel half a Line." Director, OWCP v. Rasmussen, 440 U.S. 29, 47 (1979).

The Longshoremen's Act establishes a workmen's compensation scheme based upon payment of compensation by the employer voluntarily and without an award. The Act provides in Section 14(a) "compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer." 33 U.S.C. §914(a). The Act further provides in Section 14(c) that upon making the first payment of compensation, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the Secretary, that payment of compensation has begun. 33 U.S.C. §914(c). The form prescribed by

the Secretary when notifying the deputy commissioner is Form LS-206, Payment of Compensation Without Award. Yet the Fourth Circuit has focused on the filing of this very form (Payment of Compensation Without Award) to create a compensation award. The Fourth Circuit focuses on mere acceptance of compensation by the longshoreman as a pivotal event in determining when there has been "an award in a compensation order" although the payment has been made "without an award." In the logic of the Fourth Circuit, "payment of compensation without award" becomes "an award in a compensation order." The plain language of the statute has been turned inside out. Such a construction is surely incongruous and inappropriate for a statute which is to be construed in favor of injured employee and so as

to avoid harsh and incongruous results. Voris v. Eikel, 346 U.S. 328 (1953).

In American Stevedores v. Porello, supra., this Court concluded that mere acceptance of compensation benefits did not preclude an employee from suit against the third party. Instead, the Court recognized:

> "The apparent purpose of the Act is to provide payments during the period while the employee is unable to earn, when they are sorely needed, without compelling him to give up his right to sue a third party when he is least fit to make a judgment of election. For these reasons we think that mere acceptance of compensation payments does not preclude an injured employee from thereafter electing to sue a third party tortfeasor." 330 U.S. at 456.

The result of the Fourth Circuit's Simmons holding however does operate to cut off a longshoreman's right to sue

during a time he is unable to earn, when compensation benefits are sorely needed. Under Simmons, the statute of limitations for longshoremen becomes six months from the first compensation payment. Since the first compensation payment is ordinarily made within two weeks after the injury, longshoremen in the Fourth Circuit have a six month plus two weeks statute of limitations.

The results are dramatically different in the Second Circuit geographical area. In that Circuit, until there is a signed settlement agreement between the employer and the longshoreman, with approval from the Labor Department, there is no award. Rodriguez, 617 F.2d at 959.

In Verderame v. Torm Lines, 670 F.2d 5 (2d Cir. 1982), the Second Circuit had before it a longshoreman who was injured in June, 1975. He received

interim compensation payments, described as Payment of Compensation without Award, from then until January, 1977, when he filed a third party suit. He received compensation payments until August, 1978. At that time, the longshoreman and the employer entered into a settlement agreement, embodied in a Labor Department compensation order, requiring payment of an additional sum in settlement of the compensation claim. The Second Circuit held that until the amount of compensation benefits to be recovered by the injured longshoreman is fixed, either by order, stipulation of the parties, or informal award, there cannot be an "acceptance of compensation under an award in a compensation order" within the meaning of Section 33(b) of the Act. Id. at 7. Accordingly, since the longshoreman in Verderame brought suit prior to the settlement of his

compensation claim, the Court of Appeals reversed the district court's dismissal of his third party suit. In the Fourth Circuit however, plaintiff Verderame would have been barred from suit six months after his compensation payments began in June, 1975.

The Second Circuit followed similar reasoning in D'Amico v. Cia. de Nav. Mar. Netumar, 677 F.2d 249 (2d Cir. 1982). There, D'Amico was injured in December, 1974. He received interim compensation payments from his employer until September, 1975. The longshoreman and the employer then began settlement discussions, which culminated in a payment made by the employer in December, 1975. The Labor Department inquired of the longshoreman whether he was dissatisfied with the settlement, but he never responded. A formal order approving settlement was never entered

by the Labor Department. A third party suit was filed by the longshoreman in August, 1977. The district court dismissed the suit for being brought more than six months after the December, 1975 settlement payment. The Second Circuit reversed the dismissal on the grounds that further development of the facts was necessary to establish an approved settlement agreement which could be construed as an award. In the Fourth Circuit however, plaintiff D'Amico would have been barred from suit six months after his compensation payments began in December, 1974.

The significant difference between the period within which a longshoreman may sue in the Second Circuit and the far briefer period he may sue in the Fourth Circuit is indefensible. A federal statute requires a uniform national interpretation. Yet in the

Second Circuit, longshoremen can sue third parties even though the longshoremen have received interim compensation payments, until there is an approved compensation settlement. However in the Fourth Circuit, longshoremen cannot sue more than six months after acceptance of their very first compensation payment. In the Second Circuit each of the petitioners here before this Court would retain his right to sue; in the Fourth Circuit none retained that right. There is, of course, no statutory language which would support the different interpretation of the Longshoremen's Act in Norfolk, Baltimore, or Charleston from that in New York City. All American longshoremen should have an equal opportunity to prosecute third party claims. Review by this Court is

necessary to provide a uniform national interpretation.

This petition presents a question of federal law which should be, but has not been, settled by this Court. Already a split of authority exists between the Second Circuit and the Fourth Circuit. In addition, the District Court for the District of Columbia has rejected the Fourth Circuit view and declined to hold that mere acceptance of compensation benefits by an injured employee, without approval of a settlement by the Labor Department, constitutes and award in a compensation order. Collier v. John Mendis Inc., 526 F.Supp. 459 (D. D.C. 1981); Fearson v. Johns-Manville Sales Corporation, 525 F.Supp. 671 (D. D.C. 1981). The district court in the Eastern District of Pennsylvania also declines to find an award in a compensation order upon mere

receipt of compensation and notice to the Labor Department that compensation has been started. Klitznsky v. Pakistan Shipping Corporation, 530 F.Supp. 326 (E.D. Pa. 1981); Dunbar v. Retla Steamship Co., 484 F.Supp. 1308 (E.D. Pa. 1980). There too the Fourth Circuit view has been rejected. Also, the district court for the Western District of Washington has refused to consider mere acceptance of compensation sufficient to constitute an award. Sea Quest Marine Inc. v. Cove Shipping Inc., 474 F.Supp. 166 (W.D. Wash. 1979). The Supreme Court should settle the question once and for all of what constitutes "an award in a compensation order filed by the deputy commissioner."

The Fourth Circuit's Simmons ruling is founded upon the Fourth Circuit's earlier ruling in Liberty Mutual Insurance v. Ameta & Co., supra.

While the Fourth Circuit has extended Liberty Mutual even further in its Simmons holding, this Court should recognize that the Liberty Mutual rationale has been severely criticized by other courts. See Fearson, supra, Collier, supra; Klitznsky, supra, Dunbar, supra; DeMonte v. Shipping Corporation of India, 476 F.Supp. 392 (S.D. N.Y. 1979); Sea Quest Marine, supra; and the district court opinion in Rodriguez, 456 F.Supp. 1014 (S.D. N.Y. 1978). This Court should exercise its power of certiorari to bring the Fourth Circuit back from its aberrant interpretation of the assignment provision of the Longshoremen's Act.

II

The Fourth Circuit Court of Appeals also ruled that after a statutory assignment, the employer may not voluntarily reassign to the

longshoreman the right to pursue the third party claim. The Fourth Circuit had previously ruled that such voluntary reassignment by the employer was permissible. Caldwell v. Ogden Sea Transport Inc., 618 F.2d 1037 (4th Cir. 1980). However in view of criticism of Caldwell contained in this Court's Rodriguez opinion, the Fourth Circuit in Simmons determined that voluntary reassignments were not permissible. This Court's Rodriguez opinion does not preclude voluntary assignments from the employer to the longshoreman. That question was simply not presented to the Court in Rodriguez and therefore was not answered by Rodriguez. In fact, Rodriguez contains language which supports an employer's right to revest in the longshoreman the right to sue. This Court wrote that "when the §33(b) assignment occurs, it transfers the

employee's entire right to commence a third party action to the employer," 68 L.Ed. 2d at 479, and "the legislative history indicates that once the 6-month period expires, the employer possesses complete control of the 3d-party claims." Id. at 484. If the employer as statutory assignee possesses complete control, he must be able to voluntarily revest the right to sue in the injured worker. Otherwise, by definition, the employer's control is less than complete.

Permitting voluntary reassignment by the employer is also in keeping with prior practice under the Longshoremen's Act. Johnson v. Sword Line, 146 F.Supp. 1940 (E.D. Pa. 1956); aff'd. 257 F.2d 541, 544-46 (3d Cir. 1958); The Owen, 43 F.Supp. 897 (E.D. Pa. 1942); Magee v. McNany, 10 F.R.D. 5 (W.D. Pa. 1950).

Accordingly, since this Court did not preclude voluntary reassignment in its Rodriguez opinion and since prior practice in the Third Circuit and in the Caldwell opinion in the Fourth Circuit permitted voluntary reassignment, the Court of Appeals for the Fourth Circuit erred in holding that voluntary reassignment was impermissible.

CONCLUSION

For the reasons set forth herein, because the Court of Appeals for the Fourth Circuit has created a definition of "award in a compensation order filed by the deputy commissioner" which is markedly inconsistent with the definition of award approved by the Second Circuit in Rodriguez, because the Fourth Circuit definition of award is inconsistent with the statutory language and with the intent of Congress, and because the Fourth Circuit has

misinterpreted this Court's Rodriguez opinion, petitioners herein pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit entered April 12, 1982.

Respectfully submitted:
John H. Klein,
Ralph Rabinowitz,
Counsel for Petitioners.

CERTIFICATE OF SERVICE

I John H. Klein certify that on July 12th, 1982, 40 copies of this Petition for Certiorari were mailed or delivered to the Clerk, United States Supreme Court and three copies were mailed to:

John B. King, Jr., counsel for Ogden Sea Transport, Inc., Companhia de Navegacao Maritima Netumar, Compania Crasatlantica Espanola, S.A, 2050 Virginia National Bank Bldg., One Commercial Place, Norfolk, Virginia 23510;

Carter B.S. Furr, counsel for Nakliyati, & Hellenic Lines, Ltd., P.O. Box 1039, Norfolk, VA 23501;
and

John R. Crumpler, Jr., counsel for Bank Line and Sea-Land Services, P.O. Box 119, Norfolk, VA 23501.

John H. Klein

APPENDIX

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk, John A. MacKenzie, Chief District Judge, and J. Calvitt Clarke, Jr., District Judge.

Argued: January 7, 1982
Decided: April 12, 1982

Before WIDENER, HALL and CHAPMAN, Circuit Judges.

HALL, Circuit Judge:

These consolidated appeals involve common issues of law regarding a longshoreman's right to sue third parties pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, et seq. For the reasons expressed herein, we affirm the decision of the district court.

Each of the cases involves a longshoreman who was injured on the job and who accepted compensation benefits without contravention by their employers. Each longshoreman later brought an action against an allegedly negligent shipowner pursuant to 33

U.S.C. § 905(b). In each case the district court concluded that the plaintiff had received "an award in a compensation order" more than six months prior to the institution of his action, and that pursuant to 33 U.S.C. §933(b) the plaintiff no longer retained the right to sue the shipowner.[1] As to plaintiffs Bandy, Caldwell and Hart, the court additionally ruled that certain purported reassignments of the claims executed by their employers were invalid because the LHWCA did not expressly sanction reassignments. Based on these

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[1] The district court reached this conclusion in an earlier opinion concerning one of the appellants, Bandy v. Bank Line, Ltd., 442 F.Supp. 882 (E.D. Va. 1977). That decision was affirmed on appeal as to the claims of appellants Bandy, Caldwell, Harold and Curry. Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037 (4th Cir. 1980). In its opinions in the current cases, the district court relied upon our affirmance of its earlier decision.

rulings, the court entered summary judgment in favor of the defendants.

Two principal issues emerge from these rulings. First, we must identify the event or events which create "an award in a compensation order" sufficient to trigger the six-month period set forth in Section 933(b). Second, we must determine whether an assignee who has acquired the claim upon expiration of the six-month period may reassign that claim to the injured longshoreman.

I.

> 33 U.S.C. §§ 933(a) and (b) provide:
>
> (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation

> or to recover damages against such third person.
>
> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or [the Benefits Review] Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

Under these subsections, a longshoreman who accepts "compensation under an award in a compensation order" has six months to bring an action against the third party, and the failure to do so operates as an assignment of the claim to the employer or its subrogee. 33 U.S.C. §933(h). Thus, the critical phrase for purposes of the assignment is "an award in a compensation order."

In Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir.

1977), we stated "that an award under a compensation order does not require formal entry of an award per se." 564 F.2d at 1102. In Ameta, an injured longshoreman accepted compensation payments without a formal order and the deputy commissioner received, accepted and filed certain supporting documents pertaining to the longshoreman's claim. Without delineating minimum requirements, we held that these supporting documents represented sufficient affirmative action and a determination by the deputy commissioner " so as to constitute an 'award' of benefits in a compensation order under 77 U.S.C. §933(b)." Id. at 1103. Although Ameta involved an action between the employer's insurance carrier and the third party shipowner, this Court subsequently extended the Ameta interpretation of "award" to a

straightforward longshoreman versus shipowner lawsuit in Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037 (4th Cir. 1980).[2]

Having determined that Section 933(b) contemplates an informal award, we next turn to the requisites of such an award. As revealed by the facts of these cases, a number of events may occur during the disability period which could be interpreted as the culmination of an informal award.[3] However, as we stated

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[2]As a preliminary argument, the appellants argue us to limit Ameta to its facts. This argument is foreclosed by Caldwell.

[3]All appellants filed their actions more than six months after compensation payments were initiated; however, the pattern of payments varies from case to case. Bandy, Caldwell, Curry and Harold filed their actions more than six months after receiving their last compensation payment; none of these claimants ever received a formal award. Simmons filed his action while receiving payments, but the payments had once been interrupted when he attempted to return to work; he also did not receive a formal award. Hart received payments from July 27,

in Ameta, the essence of an award is "an act of ratification of compensation, whether formal or informal, and the subsequent acceptance by the claimant," 564 F.2d at 1102. In addition, the award must serve the dual purpose of protection the welfare and rights of the longshoreman while not unduly delaying the employer's access to relief from the negligent third party.

With these concepts in mind, we hold that "an award in a compensation order" is created by the completion of three events: (1) the employer, having not contravened its liability, initiates

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1978 until September 3, 1979, and then received a lump sum payment in a formal order dated October 26, 1979; he filed his action more than six months later in July, 1980. McLean filed his action while receiving payments, but subsequent to the filing date received a formal award of permanent total disability. Spratley filed his action while receiving payments and within six months of a formal order of permanent total disability.

compensation payments to the longshoreman; (2) the deputy commissioner files the employer's notice that compensation payments have been initiated; and (3) the longshoreman accepts any of the payments.[4] Such an award triggers the six-month period without regard to subsequent suspensions in payment or formal awards of benefits. We believe that this rule will foster the prompt payment of benefits by eliminating the need for perfunctory contravention by the employer, and will provide the employer with access to its remedies within a reasonable time. As in all such cases, the six-month period will protect the longshoreman by giving him an opportunity to investigate and weigh his options.

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[4] In accord with our decision in Larson v. Associated Container Transp. (Australia) Ltd., 459 F.Supp. 561 (E.D. Va. 1978).

II.

The LHWCA contains no provision for the actual, voluntary reassignment of a claim once the six-month period expires and the claim has vested in the assignee. In Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037 (4th Cir. 1980), we ruled that such assignments were proper. However, certain aspects of Caldwell were subsequently criticized and rejected by the Supreme Court in Rodriguez v. Compass Shipping Co., Ltd., 101 S.Ct. 1945 (1981). Accordingly, our analysis must center upon the validity of Caldwell-type reassignments in the aftermath of Rodriguez.

Caldwell sanctioned both voluntary and involuntary reassignments subsequent to the expiration of the six-month period. A voluntary or actual reassignment simply required the statutory assignee to reassign the claim

to the injured longshoreman. To obtain an involuntary reassignment, the longshoreman could compel the assignee to either sue the third party or reassign the claim. In support of these rulings, we relied upon Congress' intent that third parties be held to liability and the absence of conflict with the LHWCA.

The Caldwell rationale was sharply criticized in Rodriguez. After reviewing the LHWCA, its amendments and the problems which arose in its administration, the Supreme Court concluded that "once the 6-month period expires, the employer possesses complete control of third party claims." 101 S.Ct. at 1954. With this principle as its touchstone, the Court rejected the Caldwell rule that a longshoreman could compel the assignee to either sue or assign the action.

Although Rodriguez limited its discussion to the longshoreman's residual or concurrent rights in the post-assignment period, the Court strenuously emphasized "[t]he comprehensive character of the procedures outlined in the Act...." 101 S.Ct. at 1956. In light of the admonition to refrain from "fashioning...an entirely new set of remedies," id., we are constrained to rule that the purported assignments were invalid as a matter of law because they fall outside the purview of the LHWCA.

Accordingly, the judgment entered by the district court in each of these cases is affirmed.

A F F I R M E D.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MELVIN BANDY,
Plaintiff,
v. C/A No. 77-716-N
BANK LINE, LTD.,
Defendant.

AMENDED OPINION AND ORDER

This matter comes before the Court on the defendant's Motion for Summary Judgment filed on May 22, 1981. The plaintiff, a longshoreman, has filed a suit seeking damages for injuries suffered while working aboard a vessel owned and operated by the defendant. The injuries allegedly were caused by the negligence of the defendant. On November 29, 1977, the defendant filed a Motion for Summary Judgment contending that the workmen's compensation benefits received by the plaintiff under the Longshoremen's and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. §901 et seq., had terminated prior to

the six months before the institution of the suit, thus extinguishing the plaintiff's right to bring suit. The plaintiff has admitted that the instant suit was filed after this six-month period had expired.

In an Opinion and Order dated December 30, 1977, addressing the issue raised by the defendant's motion, we held that plaintiff's failure to file suit within six months of the termination of his statutorily required compensation benefits resulted in a statutory assignment from the plaintiff to his employer of the exclusive right to proceed against the vessel owner pursuant to section 33(b) of the Act, 33 U.S.C. §933(b) (1976)[1] despite the fact

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[1]The statute provides in pertinent part:

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as

that no formal award had been made to the plaintiff. Bandy v. Bank Line Ltd., 442 F.Supp. 882, 883-84 (E.D. Va. 1977).[2] We also emphasized, however, that under Czaplicki v. The Hoegh

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an assignment of the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. §933(b) (1976).

[2]Our ruling that the lack of a formal award did not preclude the operation of the statute was based on the unequivocal mandate found in Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097, 1103 (4th Cir. 1977). In Ameta, as in the majority of similar cases, the suit was initiated not by the employer, but by the compensation insurance carrier. Section 33(h) of the Act provides that when "the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section." 33 U.S.C. § 33(h) 1976. Accordingly, the eventual assignee of the right to sue following the expiration of the six-month period available to the employee under the Act may be either the employer or the employer's compensation carrier.

Silvercloud, 351 U.S. 525 (1956), proof of an established conflict between the interests of the assignee employer and the interests of the employee coupled with the inaction of the employer would result in a retention by the employee of the right to sue the vessel owner beyond the six-month period allowed by the Act. Bandy v. Bank Line Ltd., 442 F.Supp. at 886.[3] See also McClendon v. Charente Steamship Co., 348 F.2d 298 (5th Cir. 1965). Accordingly, we denied the defendant's Motion for Summary Judgment to permit the plaintiff to develop

[3] In Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525, 531 (1976), the Supreme Court found a conflict of interest because the compensation carrier of the employer was also the insurer of the third party defendant most likely to be held liable and, as such, the injured longshoreman's "rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced." Id. at 530.

evidence, if any existed, demonstrating the existence of a conflict of interest.

On April 7, 1978, the defendant filed a second Motion for Summary Judgment, contending that the plaintiff had not sought any discovery or presented any issues of fact with respect to the conflict of interest. The plaintiff thereafter advised this Court that he had no further evidence to present on this issue. Accordingly, following a review of the file, we found no evidence of a conflict of interest and granted the defendant's Motion for Summary Judgment because, under the statute, the plaintiff's delay in filing suit of more than six months after the termination of his compensation benefits resulted in an exclusive assignment of his right of action to his employer.

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The plaintiff appealed[4] and the United States Court of Appeals for the Fourth Circuit, in a detailed opinion, vacated and remanded the judgment of this Court. Caldwell v. Ogden Sea Transport Inc., 618 F.2d 1037 (4th Cir. 1980). The court specifically affirmed our rulings that an informal award was sufficient to trigger the running of the six-month period and that the assignment of the claim to the employing stevedore after six months was exclusive. Id. at 1041-1043. The court stated, however, that the basis of the conflict of interest exception created by the Supreme Court in Czaplicki was that

> notwithstanding a statutory assignment of the longshoreman's right of action, that right of action may be revested in the longshoreman when it becomes manifest that the

[4]The appeal was consolidated with five other cases addressing the same issue

> assignee, with knowledge of its exclusive right to control and prosecute the claim, nevertheless declines to do so for any reason.

Caldwell v. Ogden Sea Transport, Inc., 618 F.2d at 1046. Based on this reasoning, the court held that the exclusive right of action revests in the longshoreman if two conditions are fulfilled. First, the longshoreman must formally signal to the assignee that he wishes the assignee to prosecute the claim under peril of having the exclusive right of action revert to him. Second, the assignee must formally signal its disinclination to pursue the claim. Id.

The defendant has renewed its Motion for Summary Judgment, relying on the recent Supreme Court decision in Rodriguez v. Compass Shipping Ltd., 49 U.S.L.W. 4527 (May 18, 1981). In

addition, the plaintiff has filed a Supplemental Amended Complaint in which he alleges that American Mutual Insurance Company ("American") has reassigned to the plaintiff the right to proceed against the defendant. In support of this allegation, the plaintiff's counsel has filed his own affidavit, accompanied by a letter, dated June 5, 1981, signed by Mr. Robert Hunter, the District Claim Supervisor for American. The affidavit states that American had made compensation payments to the plaintiff pursuant to the Act. Mr. Hunter's letter states that American has decided "to assign to [the plaintiff], the right to proceed with this third party action."

The issue in Rodriguez was "what, if any, right the longshoreman has against the third-party shipowner if he

does not sue within the six-month period and the employer fails to do so thereafter," Id. at 4528, precisely the issue addressed by the Fourth Circuit in Caldwell. After an exhaustive examination of the legislative history of the Act, preceded by the caveat that "'absent a clearly expressed legislative intention to the contrary, the [statutory] language must ordinarily be regarded as conclusive.'" Id. at 4529 (citation omitted), the Court essentially found that the longshoreman's right to file suit was completely cut off unless he could prove a conflict of interest as delineated by Czaplicki.

Although Caldwell was not before it, the Supreme Court discussed that decision and specifically rejected the Fourth Circuit's judicially created

reassignment of a right of action to the employee when the assignee fails to prosecute the claim.

> The predicate for the Fourth Circuit's analysis was an assumption that Congress did not intend to allow the longshoreman to lose his rights against a third party simply because (a) he failed to take any action within 6 months and (b) his employer decided not to sue the third party thereafter.... We are persuaded that the reason Congress did not specifically provide the solution which the court readily found is that Congress did indeed intend to require the employee either to act promptly or to accept the consequences of an assignment of his claim to the employer. One of the consequences of such an assignment is the risk that the employer will choose not to sue. The comprehensive character of the procedures outlined in the Act precludes the fashioning of an entirely new set of remedies to deal with an aspect of the problem that Congress

> expressly addressed. The fact that parties sometimes fail to assert meritorious claims within the period authorized by law is not a sufficient reason for refusing to enforce an unequivocal statutory bar.

Id. at 4531-32 (footnotes omitted). This language effectively overturns the basis upon which the Fourth Circuit reversed our grant of the defendant's previous Motion for Summary Judgment and clearly indicates that once the exclusive right of action has been assigned to the employer by virtue of the operation of section 33(b) of the Act, it does not revest in the employee simply because the employer fails to pursue the claim. In addition, the Fourth Circuit's affirmance of our ruling that more than six months had elapsed between the award to the plaintiff and the filing of his

Complaint was not disturbed by the Supreme Court in Rodriguez. The Court specifically stated that for purposes of its decision, it was assuming that the acceptance of compensation, even without a formal award, triggered the running of the six-month limitation of the Act, and limited its review of the issue of whether reassignment of the employee occurred upon the employer's failure to prosecute the action. Id. at 4527 n.3. Thus, insofar as the issue of when an award is made triggering the six-month limitation, we are bound by the Fourth Circuit's holdings in Caldwell and Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d. 1097 (4th Cir. 1977). Accordingly, American's failure to file suit has not resulted in an automatic reassignment to the plaintiff of this right.

We next address the issue of the effectiveness of the express assignment of the right to sue executed by American and delivered to the plaintiff.[5] The Fourth Circuit in Caldwell viewed an express reassignment as one of the procedural tools for effectuating what is perceived to be the underlying purposes of the Act and of Czaplicki.[6]

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[5]Although we have doubts about the ability of the short letter to act as an effective and binding assignment under general contract law, we assume for the purpose of this opinion that this letter meets the contractual prerequisities of a valid assignment.

[6]The practical and procedural means for realizing these are also readily found. A longshoreman desiring to force decision can of course first proceed extra-judicially to request action by the assignee or, as an alternative, formal reassignment of the right of action. As we indicate in Part IV of this Opinion, a formal reassignment will be effective to revest the exclusive right of action in the longshoreman.

Caldwell v. Ogden Sea Transport, Inc., 618 F.2d 1037, 1046 (4th Cir. 1980) (emphasis supplied).

618 F.2d at 1046. As we have already indicated, the Supreme Court in Rodriguez rejected the underlying basis of the Caldwell decision and disapproved of the Fourth Circuit's fashioning a remedy that the comprehensive character of the procedures outlined in the Act did not specifically provide. Rodriguez v. Compass Shipping Co., 49 U.S.L.W. at 4531-32. Moreover, the Court specifically addressed the issue of a nonstatutory right to a reassignment created by the Fourth Circuit[7] and discussed the procedural mechanism for implementing this right delineated by the Fourth Circuit. The Court, guided

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[7] In an attempt to avoid the conclusion mandated by its plain language, petitioners contend that the Act should be construed...to grant the employee an implicit right to have the third-party claim reassigned if the employer fails to sue.

Rodriguez v. Compass Shipping Co., 49 U.S.L.W. 4527, 4529 (May 18, 1981).

by the concept that when "interpreting the intent of Congress in fashioning various details of this legislative compromise, the wisest course is to adhere closely to what Congress has written." Id. at 4533 (footnote omitted), concluded that there was "no evidence that congress created either the substantive right itself or the procedural rights that the court discerned." Id. at 4531 (emphasis supplied). "The meaning of §33(b) is plain and should be respected." Id. at 4533. Thus, in the absence of a conflict of interest, the Court found that no means (procedural rights) existed by which an assignment of the right to bring suit (substantive right) could be made by the employer or his compensation carrier and that the

employee had no right to receive (substantive right) such an assignment.

Accordingly, we FIND that the assignment from American to the plaintiff is ineffective and does not revest in the plaintiff the right to file suit against the defendant. The language of the Act is plain and unequivocal and does not provide for either the substantive right to receive such an assignment or for the procedure used by the plaintiff. To hold otherwise would constitute an end run around and make a mockery of the clear Congressional mandate that a longshoreman file his suit within six months of the receipt of an award. Absent a conflict of interest, an employer or compensation carrier who had failed to pursue the cause of action, either because it had been dilatory or

because it believed that the action was so weak that it did not wish to risk the costs of litigation, certainly would assign that right to the employee in the hope that the employee would initiate the action.[8] If, for example, the

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[8]The Caldwell court noted three reasons for the assignee's failure to file suit following a statutory assignment under section 33 of the Act:

> It may not consider a claim thought meritorious by the longshoreman to be sufficiently so to warrant the expense of litigation. It may have a specific conflict of interest that militates against prosecuting the claim. It may simply be dilatory to the point that the claim is threatened by a limitations bar.

Caldwell v. Ogden Sea Transport, Inc., 618 F.2d 1037, 1045 (4th Cir. 1980). In the second situation, the employer or his compensation carrier certainly would refuse to assign the right of action. The longshoreman, however, should be able to file suit under the Czaplicki exception and no express written assignment would be required. In the first and third situations, the employer or compensation carrier would have no reason to prevent another party from

employee brought suit seeking a nuisance settlement, to harass the third-party tortfeasor, or even in the mistaken belief that he had a valid claim, the employer or its compensation carrier, by virtue of its statutory lien, would be the beneficiary, without risk, of any unexpected recovery.

Accordingly, an employer or compensation carrier would be foolish not to expend the insignificant effort required to execute an assignment of the right of action upon a request by the

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filing suit. It would have no interest in the effect of such a suit on the third-party tortfeasor. By failing to file suit, it would have lost its ability to recover the compensation benefits paid to the longshoreman. If an assignment were viewed as effective, the employer or compensation carrier would retain a lien on the longshoreman's recovery, if any, to the extent of any compensation payment made to the longshoreman, see 33 U.S.C. §933(b) (1976); Boomer v. Liberty Mutual Ins. Co., 445 U.S. 74 (1980), and the longshoreman would be able to obtain an assignment simply by requesting one.

longshoreman in every case that it had decided not to pursue and in which no conflict of interest existed. The circumstantial evidence in the instant case supports our conclusion. The assignment here was executed by an officer of American, the compensation carrier, approximately one week after the submission of a request for such an assignment by the plaintiff's attorney. Moreover, the request was submitted on May 28, 1981, only ten days after the Supreme Court decided Rodriguez. The Act and its legislative history, as interpreted by the Rodriguez Court, clearly forbid such a pro forma procedure for reinstating a longshoreman's right to sue a third party once he has lost such a right because of his failure to file suit

within the six-month limit established by the Act.

Conclusion

In sum, we FIND that the exclusive right to the instant cause of action was assigned to the plaintiff's employer under section 33(b) of the Act. Moreover, under Rodriguez, a reassignment of the action can occur only if evidence of a conflict of interest, as delineated in Czaplicki, is present; the simple failure of the employer to prosecute the claim is not enough.[9] The record contains no evidence of a Czaplicki type of conflict. Moreover, the assignment

[9] The notion adopted in some post-Czaplicki decisions that a conflict of interest may be presumed whenever an employer does not sue on an assigned claim is simply untenable in light of the plain statutory language and history of the 1959 and the 1972 Amendments.

Rodriguez v. Compass Shipping Co., 49 U.S.L.W. 4527, 4533 (May 18, 1981).

executed by American and delivered to the plaintiff is ineffective. Accordingly, the defendant's Motion for Summary Judgment is GRANTED and the plaintiff's Complaint is DISMISSED.

I have consulted my fellow judges in this division and they have authorized me to say that they concur with this Opinion.

/ss/
United States
District Judge

July 27, 1981
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

THOMAS E. McLEAN,
Plaintiff,
v. CA No 79-366-N
CIA TRANSATLANTIC ESPANOLA S.A.,
Defendant.

O R D E R

The Court having received no response to its letter of July 28, 1981, this matter is now ripe for action on the defendant's Motion for Summary Judgment. The Motion for Summary Judgment is GRANTED and this action is DISMISSED with prejudice. Bandy v. Bank Line, Ltd., C/A No. 77-716-N (E.D. Va. July 27, 1981) (Amended Opinion and Order).

/ss/
United States District Judge

August 14, 1981
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PEARLIE SIMMONS,
Plaintiff,
v. C/A No. 80-1181-N
SEA-LAND SERVICES, INC.,
Defendant.

ORDER

The motion of the defendant for summary judgment is GRANTED, see Bandy v. Bank Line Ltd., Clarke, J., July, 7, 1981.

It is so ORDERED.

/ss/
United States District Judge
Norfolk, Virginia
August 12, 1981

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION

FRED L. SPRATLEY, and
ATLANTIC & GULF STEVEDORES, INC.,
Plaintiffs,
v. C/A No. 80-1151-N
HELLENIC LINES, LTD.,
Defendant.

O R D E R

The Court is of the opinion that the defendant's Motion for Summary Judgment is now ripe for decision. The motion is GRANTED and this action is DISMISSED with prejudice. Bandy v. Bank Line, Ltd., C/A No. 77-716-N (E.D. Va. July 27, 1981) (Amended Opinion and Order).

/ss/

United States District Judge

Dated August 17, 1981
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

CHARLES A. CALDWELL,
Plaintiff,
v. C/A No. 77-317-N
OGDEN SEA TRANSPORT, INC.,
Defendant.

O R D E R

The Court finds the defendant's Motion for Summary Judgment ripe for decision, no response having been received from this Court's letter of July 28, 1981.

The Motion for Summary Judgment is GRANTED and this action is DISMISSED with prejudice. Bandy v. Bank Line, Ltd., C/A No. 77-716-N (E.D. Va. July 27, 1981) (Amended Opinion and Order).

/ss/
U.S. District Judge

August 17, 1981
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

WALLACE CURRY,
Plaintiff,
v. C/A No. 77-720-N
COMPANIA CRASATLANTICA ESPANOLA, S.A.,
Defendant.

O R D E R

The Court having received no response to its letter of July 28, 1981, this matter is now ripe for action on the defendant's Motion for Summary Judgment. The Motion for Summary Judgment is GRANTED and this action is DISMISSED with prejudice. Bandy v. Bank Line, Ltd., C/A No. 77-716-N (E.D. Va. July 27, 1981) (Amended Opinion and Order).

/ss/
United States District Judge

August 17, 1981
Norfolk, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

WILBERT C. HAROLD,
Plaintiff,
v. C/A No. 77-507-N
COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Defendant.

O R D E R

The Court having received no response to its letter of July 28, 1981, this matter is now ripe for action on the defendant's Motion for Summary Judgment. The Motion for Summary Judgment is GRANTED and this action is DISMISSED with prejudice. Bandy v. Bank Line, Ltd., C/A No. 77-716-N (E.D. Va. July 27, 1981) (Amended Opinion and Order).

/ss/
United States District Judge

August 17, 1981
Norfolk, Virginia

Office - Supreme Court, U.S.
FILED
SEP 10 1982
ALEXANDER L. STEVAS,
CLERK

Docket No. 82-56

In the Supreme Court of the United States

October Term, 1982

PEARLIE SIMMONS,
Petitioner

v.

SEA-LAND SERVICES, INC.,
Respondent.

SUPPLEMENT AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Ralph Rabinowitz
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No. 81-3250

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOSEPH DURIS,
Plaintiff-Appellant,

v.

ERATO SHIPPING, INCORPORATED; JAPAN LINE LIMITED; REGENT BOTAN SHIPPING, INC.; PALLAS SHIPPING AGENCY, LTD.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed July 16, 1982

Before: KENNEDY and MARTIN, Circuit Judges; and DUMBAULD, Senior District Judge.*

BOYCE F. MARTIN, JR., Circuit Judge. Joseph Duris appeals the dismissal of his personal injury action. The District Court dismissed Duris' claim for failure to establish in personam jurisdiction over the defendant Pallas Shipping Agency, Inc.

Duris was injured in May, 1975 while working as a longshoreman on a vessel in the Port of Toledo, Ohio. He originally tried to sue Erato Shipping, the vessel's dry boat charter. Erato Shipping was subsequently merged into the present defendant, Pallas Shipping.

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* Honorable Edward Dunbauld, Senior Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

On appeal, Pallas argues that the District Court properly dismissed Duris' complaint because Pallas, as distinct from Erato, has never had sufficient business contacts in Ohio to bring it within the reach of that state's long arm jurisdictional statute.[1] In the alternative, Pallas contends that Duris' action is time-barred by the limitations period of the federal workmen's compensation statute under which he received benefits. We find no merit in either argument and reverse. We will consider Pallas' second, more difficult argument, first.

Shortly after his injury, Duris began to receive benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*. Under that statute and its regulations, injured employees receive compensation in one of two forms. If the employer controverts the claim, any benefits are paid pursuant to an award documented in a compensation order. 33 U.S.C. § 914; 20 C.F.R. §§ 702.251-.351 (1981). If, on the other hand, the claim is not contested, compensation is paid voluntarily without an award. 33 U.S.C. § 914, 20 C.F.R. §§ 702.231-242 (1981). It is undisputed that Duris' benefits were paid voluntarily; the Secretary of Labor entered no compensation order or award in this case.

According to section 33 of the Act, if benefits are paid under an award, any claim the employee might have against a third party will be assigned to the employer unless the employee brings his own action within six months of such an award:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. § 933(b).

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[1] Ohio Revised Code § 2307.382.

This subsection does not appear to cover Duris' claim. The Act, as noted earlier, makes purposeful use of the term "award." Thus, if benefits are paid without an award, there should be no assignment and no six-month limitation period. Nevertheless, at least one court has held that the mere receipt of compensation benefits constitutes an "award" and so triggers section 33. *Larson* v. *Associated Container Transport (Australia)*. 459 F. Supp. 561 (E.D.Va. 1978). Similarly, the Fourth Circuit has held that the routine filing of the documents which must accompany even benefits paid without an award are sufficient ratification and acceptance to constitute a formal award. *Liberty Mutual Insurance Co.* v. *Ameta & Co.*, 564 F.2d 1097 (4th Cir. 1977). On the basis of this authority, Pallas argues that Duris' acceptance of compensation in May, 1975 triggered section 33 and its short statute of limitations, which expired prior to the 1977 commencement of this action. With all respect, we decline to follow *Liberty Mutual* and *Larson*.

Those cases' rationale for ignoring the narrow assignment embodied in section 33 is that unless the assignment provision is read broadly to include every longshoreman's claim, the many claims paid without an award will never be assigned to the employer. This result, the argument continues, is inequitable because without the assignment, the employer, or its subrogee insurance carrier, can not seek reimbursement from any negligent third party. Thus, to protect itself, the employer would needlessly controvert every claim in order to gain a formal award and hence the opportunity for an assignment. Unless remedied by a broad interpretation of section 33, these non-disputes will increase costs while slowing payments to injured employees. *See Liberty Mutual, supra*, at 1103.

This fear is unfounded. Employers are not dependent upon the employee's claim for reimbursement purposes. In *Federal Marine Terminals* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969), the Supreme Court held that the employer's remedy under section 33 is not exclusive. Instead, in the typical

situation where a stevedoring contractor, the employer, seeks reimbursement from a negligent shipowner, federal maritime law would permit a tort action in the employer's own right for breach of the shipowner's duty of due care:

> We must also reject the implication of the Court of Appeals' opinion that under federal maritime law the shipowner owed the stevedoring contractor no duties whose breach would give rise to a direct action for damages.
>
> As we held in Kermarec v Compagnie Generale Transatlantique, 358 US 625, 632, 3 L Ed 2d 550, 555, 79 S Ct 406, "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." That duty of due care imposed by law extends to the stevedoring company as well as to others lawfully on the ship, and its breach gives rise to a cause of action for any damages proximately caused. It is not disputed, for example, that if the shipowner's negligence caused damages to the stevedoring contractor's equipment, those damages would be recoverable in a direct action sounding in tort. We can see no reason why the shipowner's liability does not in like fashion extend to the foreseeable obligations of the stevedoring contractor for compensation payments to the representative of a longshoreman whose death was occasioned by the shipowner's breach of his duty to the stevedoring contractor.

Id. at 414-415. *See also Scindia Steam Navigation Co.* v. *De Los Santos*, 451 U.S. 156 (1981).

Furthermore, we believe that a broad interpretation of section 33 would vitiate the policy behind its narrowly precise language. Congress might well have sought to assign away an employee's claim only in those cases where the injured longshoreman is likely to be cognizant of the statutory assignment. Although not strictly an election of remedies, the loss

of one's personal injury action through an assignment is not without potentially substantial consequences. Once the assignment has been effected, the employee loses all control over the action. Should the employer decide not to sue, the claim will expire. *Rodriguez* v. *Compass Shipping Co., Ltd.*, 451 U.S. 596 (1981). Unwilling employees should not suffer this consequence. Indeed, the "award" language was added to the statute in 1938 to prevent exactly that occurrence.[2] H. R. Rep. No. 1945, 75th Cong., 3d Sess. 9; *Rodriguez*, *supra*, at 605. Prior to 1938, assignment occurred immediately upon the acceptance of compensation. Appellee's position would return the Act to its pre-1938 form with the single added protection of a six-month period in which the employee, who has done no more than passively accept benefits, may or may not learn of the impending loss of his claim.

In contrast, where a claim has been paid pursuant to an award, the employee, by virtue of the claim's contravention,

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[2] The United States Employment Compensation Commission was the moving force behind this amendment. Lewis Dalby, chief counsel for the Commission, made the following comments at the July 31, 1935 House of Representatives Subcommittee hearing on H.R. 8293:

> The only remaining section, section 10, relates to the provision of section 33, which provides that the acceptance of compensation by an injured employee shall work an assignment of his right against a third party who has caused his injury. Undoubtedly, very often employees accept compensation without realizing that effect upon their rights. So that the purpose of this is to make the assignment of the right of action arise only when compensation is accepted on an award made by the deputy commissioner. In other words, when the injury occurs, the mere fact that the employer or insurance carrier hurries up and sends a payment around, which is accepted, without knowing that that would take away the entire right, which may be very valuable, that assignment would not arise in such a case, but only if the case had gone to the deputy commissioner and had been formally heard and an award issued, so that there would be opportunity for the injured man, or those acting for him or as beneficiaries, to find out the effect of such an acceptance of compensation before taking it.

Proposed Amendments to the Longshoremen's and Harbor Workers' Compensation Act: Hearings on H.R. 8293 before the Subcomm. on the Judiciary, 74th Cong., 1st Sess. (1935).

is likely to have been brought into sufficient contact with the statute so as to ensure some cognizance of the assignment provision. Thereafter, the employee can make an informed decision. If his employer, or its insurance carrier, appears willing to maintain the action, he may allow the right to pass, knowing that the employer is entitled to recover fully on his claim. This, perhaps, is the favored result in light of the employer's greater ability to maintain a legal action. Alternatively, the employee will realize that he must act rather quickly or risk losing the right to control the action altogether.

In rebuttal, appellees argue that an informed decision on the employee's part is not critical because in any instance where the injury can be traced to a negligent third party, the employer's interest in recovering the compensation paid will simultaneously protect the rights of the employee. Furthermore, the Act provides an additional incentive by allowing the employer to keep twenty percent of any recovery over the costs of litigation and all compensation due. 33 U.S.C. § 933(d). Given these inducements and the greater resources of the employer, a broad interpretation of section 33 will benefit both the employer and the employee.

This analysis loses its appeal, however, if we consider the very real threat of conflicting interests between employer and employee.

As noted earlier, the most likely third party tort-feasor will be the vessel's owner or charterer, the owner or lessee of the longshoreman's workplace. On the other hand, the employer-assignee is by definition a stevedoring contractor whose clients are those very same shipowners or charterers. The juxtaposing of this stevedore-client relationship between the employee and the tort-feasor presents obvious disincentives to the bringing of the employee's action by the employer. If the employer-assignee depends to any significant degree upon the shipowner or charterer for future business, the probability that it will enforce the rights of its injured employee against

the third party-client is reduced. Nor will the likely imposition of the employer's carrier-subrogee between it and the third party-client alleviate the conflict. The insurance company can hardly ignore the business relationships of its own clients. This conflict of interest problem makes us hesitate to countenance any interpretation of the Act which would expand the assignment provisions of section 33. If in fact the employer is unlikely to vindicate the rights of the employee, an assignment becomes increasingly similar to the harsher legal doctrine of election of remedies. Such a substantive reinterpretation of the statute lies far beyond the power of this court.

We will not, therefore, read section 33 to encompass all claims paid under the Act. Where, as here, the injured employee has merely accepted compensation payments, no assignment occurs and the third party claim does not expire in six months. The Second Circuit gave due consideration to the policy against unwitting assignments and reached a similar conclusion. *Rodriguez* v. *Compass Shipping Co., Ltd.*, 617 F.2d 955 (1980), *aff'd on other grounds*, 451 U.S. 596 (1981).

Our holding today is that the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b). Hence Duris' claim is not time barred. *See generally Dunbar* v. *Retla Steamship Co.*, 484 F.Supp. 1308 (E.D.Penn. 1980).

The second question is quickly resolved. In its order, the court below concluded that service of process against Pallas Shipping was improper because that company had never done any business in Ohio. Requiring Pallas to submit to suit in Ohio would, in the court's opinion, offend the constitutional notions of fair play set out in *International Shoe* v. *Washington*, 326 U.S. 310 (1945).

This ruling was erroneous. Although Pallas Shipping has never had any business contacts in Ohio, its constituent corporation, Erato Shipping, clearly has. No one disputes that Erato was the bareboat charterer of the vessel upon which Duris was injured and that Erato subsequently merged with

Pallas. In this diversity action we are bound to apply Ohio law. *Poyner* v. *Erma Werke Gmbh*, 618 F.2d 1186, 1187 (6th Cir.), *cert. denied sub nom. Insurance Co. of North America* v. *Poyner*, 449 U.S. 84 (1980). That law clearly states that after a merger, the surviving corporation is liable for all claims against the constituent corporation:

> When a merger of consolidation becomes effective:
>
> The surviving or new corporation is liable for all obligations of each constituent corporation, including liabilities of defending share holders. Any claim existing or action or proceeding pending, by or against any constituent corporation, may be prosecuted to judgment, with right of Appeal, if such merger or consolidation had not taken place, or the surviving or new corporation may be substituted in its place.

Ohio Revised Code § 1701.82(A).

Thus, pursuant to this statute, if Duris can establish Ohio contacts sufficient to gain jurisdiction over Erato Shipping, he may thereby gain jurisdiction over Pallas Shipping. Any other ruling would allow corporations to immunize themselves by formalistically changing their titles.

The judgment is reversed and remanded for proceedings consistent with this opinion.

CERTIFICATE OF SERVICE

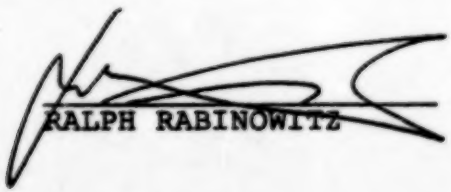
I, Ralph Rabinowitz, certify that on September 10th, 1982, forty (40) copies of this SUPPLEMENT AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI were mailed or delivered to the Clerk, United States Supreme Court, and three (3) copies were mailed to:

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CLERK

Docket No. 82-56

In the Supreme Court of the United States

October Term, 1982

PEARLIE SIMMONS,
Petitioner

V.

SEA-LAND SERVICES, INC.,
Respondent.

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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See Inside Covers For Cases Continued

MELVIN BANDY, For and on behalf of himself, individually, and
AMERICAN MUTUAL INSURANCE COMPANY of BOSTON,
Petitioners,

v.

BANK LINE, LTD.,
Respondent.

FRED L. SPRATLEY, For and on behalf of himself, individually and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

HELLENIC LINES, LTD.,
Respondent.

THOMAS E. McLEAN, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

CIA TRANSATLANTIC ESPANOLA, S.A.,
Respondent.

CHARLES A. CALDWELL, and
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

OGDEN SEA TRANSPORT, INC.,
Respondent.

WALLACE CURRY, and
ATLANTIC AND GULF STEVEDORES, INC.,
Petitioners,

v.

COMPANIA CRASATLANTICA ESPANOLA, S.A.,
Respondent.

WILBERT C. HAROLD, For and on behalf of himself, individually,
and
THE HARTFORD ACCIDENT INDEMNITY INSURANCE COMPANY,

v.

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Respondent.

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DOCKET NO. 82-56

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

Pearlie Simmons,
Petitioner
v.
Sea-Land Services, Inc.,
Respondent.

Melvin Bandy, for and on behalf of
himself, individually, and
American Mutual Insurance Company of
Boston,
Petitioners,
v.
Bank Line, Ltd.,
Respondent.

Fred L. Spratley, for and on behalf of
himself, individually, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
Hellenic Lines, Ltd.,
Respondent.

Thomas E. McLean, and
Atlantic Gulf Stevedores, Inc.,
Petitioners,
v.
CIA Transatlantic Espanola, S.A.,
Respondent.

Charles A. Caldwell, and
Commercial Union Insurance Company,
Petitioners,
v.
Ogden Sea Transport, Inc.,
Respondent.

Wallace Curry, and
Atlantic and Gulf Stevedores, Inc.,
Petitioners
v.
Compania Crasatlantica Espanola, S.A.,
Respondent.

Wilbert C. Harold, for and on behalf of
himself, individually, and
The Hartford Accident Indemnity
Insurance Company,
Petitioners,
v.
Companhia De Navegacao Maritima Netumar,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

RESPONDENT'S BRIEF IN RESPONSE

Respondents respectfully request that the Court deny the Petition for a Writ of Certiorari seeking review of the Fourth Circuit's decision in this case. The opinion below is reported at 676 F.2d 106 (4th Cir. 1982) and is reproduced at Petition (Appendix) p. 35 et seq.

STATEMENT OF THE NATURE OF THE CASES

Each of the consolidated cases involves a plaintiff longshoreman who was injured on the job and received compensation benefits from his employer or the employer's insurance carrier pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. hereinafter referred to as the "Act." Each later brought an action against a third party vessel owner (the respondents) as permitted by §905(b). In each case the district court granted summary judgment pursuant to the provisions of §933(b) because suit was filed more than six months after an award of compensation.

Four of the cases (Bandy, Caldwell, Harold, and Curry) were originally dismissed in the district court pursuant to Bandy v. Bank Line, Inc., 442 F.Supp. 882 (E.D. Va. 1977). An appeal was taken to the Fourth Circuit Court of Appeals resulting in Caldwell v. Ogden Sea Transport, 618 F.2d 1037 (4th Cir. 1980). The summary judgments were reversed and the cases remanded to the district court.

Further proceedings[1] were stayed pending this Court's decision in Rodriguez v. Compass Shipping Co., ultimately decided on May 18, 1981 at 451 U.S. 596. Caldwell, was overruled by Rodriguez, and all four defendants then refiled motions for summary judgment. The district court issued a written decision in the Bandy case styled Bandy v. Bank Line, Ltd., 518 F.Supp. 1229 (E.D. Va. 1981), hereinafter referred to as Bandy II. Appeals were again filed to the Fourth Circuit Court of Appeals.

Meanwhile, the other three claimants who have petitioned this Court for certiorari (Simmons, Spratley and McLean) had filed suits and the defendants had filed motions for summary judgment. Citing Bandy II these motions were granted and appeals filed to the Fourth Circuit.

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1 Pursuant to Caldwell, employers/compensation carriers were added as involuntary plaintiffs. No appearance was ever made by any of these parties, and their participation was mooted by Rodriguez.

The Fourth Circuit consolidated these seven cases[2] for briefing and oral argument. An opinion was rendered on April 12, 1982, Simmons v. Sea-Land Services, Inc., 676 F.2d 106 (4th Cir. 1982) and it is from this decision that the petitioners appeal.

In each of these cases the plaintiff began receiving compensation benefits under the Act shortly after his injury, and compensation benefits ceased more than six (6) months before suit was filed.

BANDY:

Melvin Bandy was allegedly injured on January 29, 1976. He received temporary total compensation benefits for the period January 30, 1976 until March 21, 1976. Bandy returned to work without any dispute as to further temporary benefits, and no claim was filed for permanent disability.

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[2] One other case that was part of the Fourth Circuit consolidation — Hart v. D. B. Denis Nakliyati T.A.S., Record No. 81-1815 — has not been appealed to this Court. Thus there were eight cases before the Fourth Circuit.

A suit for damages was filed in September, 1977.

In June, 1981, Bandy's attorney filed an affidavit reciting a reassignment to Bandy from American Mutual, the employer's carrier.

SIMMONS:

Pearlie Simmons allegedly was injured on July 5, 1979. His employer Nacirema began paying compensation benefits on a voluntary basis beginning July 6, 1979. Nacirema so advised the Department of Labor by filing an appropriate form and a copy was sent to Simmons. Payments terminated on February 3, 1980, when he returned to work. As a result of this work resumption, the employer filed an LS-208 styled "Compensation Payment Stopped or Suspended," a copy of which the Department of Labor is required to send the employee.

Simmons stopped working around the end of March, 1980, claiming further disability and Nacirema again commenced voluntary compensation payments which are continuing.

Suit was filed on October 28, 1980.

SPRATLEY:

Following plaintiff's accident of July 19, 1978, the plaintiff's employer, Atlantic & Gulf Stevedores, Inc., notified the Department of Labor of plaintiff's injury and began to pay temporary total benefits which terminated on October 20, 1978.

Thereafter, an informal conference was held at the Deputy Commissioner's Office on January 18, 1979, wherein it was recommended that the employer pay additional temporary total disability compensation commencing January 18, 1979, and a memorandum of informal conference was filed on that date. Compensation was duly paid following this conference. A second informal conference was conducted on May 9, 1979.

Later, the employer contested payment of permanent disability benefits to plaintiff and a formal hearing was held before an administrative law judge, who issued an order dated October 30, 1979, requiring payments of compensation for permanent disability.

Spratley filed two suits in the Circuit Court of Norfolk the first of which was voluntarily non-suited by

plaintff,[3] who had neither served or requested the issuance of any process. The second state court action was filed on February 5, 1980, and was also voluntarily non-suited by the plaintiff, on or about the time this federal court action was filed on October 17, 1980.

MCLEAN:

McLean was injured on or about March 4, 1976, while employed by Atlantic & Gulf Stevedores, Inc. Compensation forms and reports were filed with the Department of Labor shortly after the accident showing that compensation was being paid voluntarily. McLean returned to work for short periods of time during the years 1976 through 1979 and each time he returned to work Atlantic & Gulf filed a form showing that payments had been terminated. The first of these forms was filed with the Deputy Commissioner on June 18, 1976, showing that the last payment of compensation

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[3] The footnote in the Simmons decision at p. 109 obviously refers to this earlier suit Spratley filed in state court which he voluntarily dismissed. The petition does not address the auxiliary issue that would necessarily have to be faced if Spratley's position is accepted, viz the meaning of "commence an action" in §33(b).

was made on May 25, 1976. Suit against the shipowner was filed on January 25, 1979. After receiving temporary total disability payments for several years, McLean claimed permanent total disability and a formal hearing was held before an administrative law judge who issued an order which was filed on November 19, 1979.

HAROLD:

Harold was injured on November 1, 1976, while employed by Quinn Marine Services, Inc. He received temporary total compensation from his employer through its compensation carrier, The Hartford Accident and Indemnity Company until January 5, 1977. Suit was filed on July 22, 1977, more than six months after the last payment of compensation.

On October 5, 1981, The Hartford filed an action in the United States District Court for the Eastern District of Virginia seeking to recover damages pursuant to §933(d) and (e). That case is still pending.

CALDWELL:

Plaintiff was injured on May 7, 1976, while employed by Rogers Terminal. Plaintiff received workman's compensation benefits paid voluntarily by the carrier and forms showing the commencement of these payments were filed with the Department of Labor. Compensation was paid until July 11, 1976 and when benefits were terminated a form LS-208 was filed with the Department of Labor.

Suit was filed in May, 1977, more than six months after compensation terminated.

CURRY:

Plaintiff was injured on Janury 30, 1975, while working as a longshoreman for Atlantic & Gulf Stevedores. He immediately began receiving voluntary compensation benefits from his employer. Suit was filed in October, 1977, more than six months after the last payment of compensation in November, 1976.

ARGUMENT

POINT I: NO CONFLICT EXISTS BETWEEN THE HOLDINGS OF THE SECOND AND FOURTH CIRCUITS NECESSITATING A REVIEW OF WHAT CONSTITUTES AN ADMINISTRATIVE AWARD.

For the third time in as many years, this Court is asked to interpret §33 of the Longshoremen's Act (33 U.S.C. §933).[4] See Bloomer v. Liberty Mutual Insurance Co., 455 U.S. 74, 100 S.Ct. 925, 63 L.Ed.2d 215 (1980) and Rodriguez v. Compass Shipping Co., Ltd., 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472 (1981). In Rodriguez, the Supreme Court affirmed the dismissal of actions by longshoremen who failed to institute third-party actions within six months of an award of compensation. The Court stated, 101 S.Ct. at

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[4] Congress has been holding hearings with regard to the possible amendment of many provisions of the Longshoremen's and Harbor Workers' Compensation Act including §33(b) and proposed bills have been introduced in both the Senate and the House of Representatives. S. 1182 (introduced by Senators Nickles and Nunn on May 14, 1982); H.R.25 (introduced by Congressmen Erlenborn). S. 1182 was passed by the Senate on July 27, 1982 and is presently pending before the House of Representatives.

1955: "Congress unequivocably made the choice in favor of first giving the employee exclusive control of the cause of action for a 6-month period and then giving the employer exclusive control thereafter . . ."

The longshoremen here likewise had their actions dismissed for failure to file suit within the required six month period, resulting in assignment as a matter of law to their employers.[5] They seek to escape Rodriguez by contesting that any awards were made more than six months prior to suits being filed. In Rodriguez, no formal orders were entered, the lower courts holding that settlement agreements reached after official informal conferences were equivalent to formal orders for purposes of §33(b), thus triggering the six month

---

[5] Indeed, in at least one of these cases (Harold) the employer's compensation carrier, The Hartford Accident and Indemnity Insurance Company, has exercised its right of assignment and has filed suit against the shipowner. The district court in that action held that the insurer's action was not time-barred under the doctrine of Laches. The Hartford Accident and Indemnity Insurance Co., C/A No. 81-1013-N (E.D. Va. 1981). No doubt other such suits will follow if certiorari is denied by this Court.

period in which to file suit. This Court stated at footnote 3 in Rodriguez "[a]ccordingly, for purposes of our decision, we assume that their acceptance of compensation operated as an assignment under §33(b)." Thus, the Court did not need to review that issue.

The longshoremen seeking review in this Court allege a conflict between the Fourth Circuit and the Second Circuit on the award question and additionally assert that this is an important question of federal law which should be decided by this Court. The respondents' reply is that there is no real conflict in the holdings of the Fourth and Second Circuits and that the difference in approach by the two circuits does not present a significant question that needs to be settled by the Court at this time.

Simmons is simply a refinement of the Fourth Circuit's earlier case of Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977). There, the court held that the Act did not require a "formal" order for there to be "an award in a compensation order," but that certain administrative actions constituted an informal award so as to trigger the six month period of

time which the longshoreman had to file suit prior to his action being assigned to his employer. The court held that the voluntary payment of compensation together with the filing of the various required forms with the Deputy Commissioner (including notification that payments were stopped) together with the acceptance of the compensation, constituted an "award" with the meaning of §933(b). The court held, 564 F.2d at 1102, that ". . . some act, or some order, whether formal or informal, must occur in order for there to be a compensation award." The court then held, 564 F.2d at 1103, that the filing and acceptance by the Deputy Commissioner of the required documents:

> ". . . constituted sufficient affirmative action and a determination by the deputy commissioner granting benefits to Melson so as to constitute an 'award' of benefits in a compensation order under 33 U.S.C. §933(b) without the entry of a formal award. Melson's rights against the third parties were assigned by operation of law to his employer, the stevedoring co., 33 U.S.C. §933(b), and thereafter subrogated by operation of law to the insurance carrier. 33 U.S.C. §933(h).
>
> We believe this result is a logical one. A stevedore-employer should not be required to controvert every claim for

> compensation under the Act simply to insure the entry of a formal award in order to preserve the statutory assignment and subrogation rights of the stevedore-employer and insurance carrier under 33 U.S.C. §§933(b) and (h). Such a requirement would frustrate the Act's time-honored purpose which was to eliminate the delay and expense incident to litigation . . . and cripple the congressionally explicit goal of prompt payment of claims that need not be controverted by employers. 33 U.S.C. §914; 29 C.F.R. §702.231."

Petitioners have cited no cases, at least since the 1959 Amendments, which hold that a formal adjudication of the right of the parties was necessary in order to constitute an award.

Even in the cases cited by plaintiffs the courts have uniformily held that a formal order is not required. Rather these cases emphasize that an award does occur during the informal compensation process before the Deputy Commissioner. The only difference with the present cases being at what point in the informal process the compensation award occurs. See, for example, Dunbar v. Retla Steamship Co., 484 F.Supp. 1308 (E.D. Pa. 1980); Sea Quest Marine, Inc. v. Cove Shipping, Inc., 474 F.Supp. 164 (W.D. Wash. 1979);

Rodriguez v. Compass Shipping Co., Ltd., 456 F.Supp 1014 (S.D.N.Y. 1978).

It is submitted that the Fourth Circuit's interpretation of §33 in Liberty Mutual is fully supported by the Act and the implementing regulations. Section 14 of the Act (33 U.S.C. §914) requires that compensation be paid promptly to persons entitled thereto except when liability is controverted, and §§14(a) and (i) authorize the Deputy Commissioner to conduct investigations, cause medical examinations to be conducted, require deposits, and take such steps as may be required to properly protect the rights of the parties. Additionally, certain regulations have been promulgated to deal with non-controverted claims and the providing of medical care. See 29 C.F.R. §§702.231 - 702.236 and 29 C.F.R. §§702.401 - 702.422. Under these regulations, the employer is required to notify the Deputy Commissioner when the first installment of compensation is paid (29 C.F.R. §702.234), a report of personal injury must be made within ten days of the injury (29 C.F.R. §702.201), and the Deputy Commissioner is required to "actively supervise the medical care of an

injured employee covered by the Act." (29 C.F.R. §702.407). Thus, it is apparent that once the required reports have been filed, the Deputy Commissioner is taking affirmative action with regard to the claim such that an "award" should be deemed to have occurred.

The Second Circuit explained in its Rodriguez decision, 617 F.2d 955, 959, why there was no longer any reason to apply an overly strict interpretation of the award question under §33(b) as did such earlier cases as Toomey v. Waterman S.S. Corp., 123 F.2d 718, 721 (2d Cir. 1941); Grasso v. Lorentzen, 149 F.2d 127, 129 (2d Cir.) cert. denied, 326 U.S. 743, 66 S.Ct. 57, 90 L.Ed 444 (1945); Sessa v. Weeks Stevedoring Co., 56 F.Supp. 50 (S.D.N.Y. 1943). The Court stated, 617 F.2d at 959:

> "These decisions, however, represented an effort to relieve claimants from the harshness of the Act as it existed prior to the 1959 Amendments which govern the present case.
>
> Prior to 1959, the right to sue third parties was assigned to the employer as soon as settlement was reached. This forced an injured employee to elect at once between immediate compensation and delays and uncertainties of litigation at a time when he had cash flow problems. Many courts therefore invoked

every available technicality to avoid finding an assignment.

> Congress in 1959 amended §33(b) to permit the employee to receive a statutory compensation award which would not operate as an assignment unless he failed to sue within six months. S. Rep. No. 428, 86th Cong., 1st Sess., reprinted in 1959 U.S. Cong. & Admin. News, pp. 2134-35. With the elimination of the harshness that prompted Grasso and Sessa, the Act as it stood at the time of the events here should be construed 'from the realities of the situation rather than by the labels employed,' Sabol v. Merritt Chapman & Scott Corp., 241 F.2d 765, 767 (2d Cir. 1957)."

The longshoremen herein base their petition on an asserted conflict with Verderame v. Torm Lines, 670 F.2d 5 (2d Cir. 1982).[6] Yet, Verderame like Rodriguez, 617 F.2d 955 (2d Cir. 1980), holds, as does the Fourth Circuit, that an informal award of compensation is all that is required to start the running of the six months period for the longshoremen to file suit before an assignment occurs. The standard established by the Second Circuit is explained in Verderame, supra, at 7:

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[6] They also assert a conflict with D'Amico v. Cia De Nav. Mar. Netumar, 677 F.2d 249 (2d Cir. 1982), but the court merely remanded that case to the district court for the development of further evidence on the question of whether or not there was an award and therefore the case cannot be said to be in conflict with Simmons in its present posture.

> "For these reasons we hold that until the amount of compensation benefits to be received by the injured longshoreman is fixed, either by order, stipulation of the parties, or informal award, there cannot be an '[a]cceptance of compensation under an award in a compensation order' within the meaning of §33(b) of the Act." (Emphasis Supplied.)

Further, petitioners have severely criticized Liberty Mutual Ins. Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977) upon which Simmons was based. However, the Second Circuit,[7] rather than being in conflict with the Fourth Circuit, approves Liberty Mutual. The court in Verderame, supra, at 7, states:

> "Similarly, in Liberty Mut. Ins. Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977), relied upon by Torm, although there was no entry of a formal award, not only had the total amount of the compensation benefits payable by the insurer been agreed upon and paid, but compensation had been 'terminated' before an action against the shipowner (in that case by the employer) was commenced."

Thus, the Second Circuit adopts the principle of Liberty Mutual that if the compensation payments have terminated and six months thereafter expires before suit is filed, then the longshoremen will be barred.

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[7] Simmons had not been decided at the time of the Verderame decision.

The present cases fall squarely within the holding of Liberty Mutual and the Second Circuit's Verderame ruling — all being "last payment" cases. The amount of compensation is "fixed" when a longshoreman, as here, accepts what he believes to be his last compensation payment. Thus there is no real conflict in view of the facts in Liberty Mutual/Simmons and Verderame.

In each of the seven cases herein, compensation had been paid and terminated without controversion and appropriate forms filed with the Deputy Commissioner indicating that compensation had been stopped. In none of these cases was suit filed within six months of the initial termination of the payments. In four of these cases (Bandy, Curry, Caldwell and Harold) payments were never reinstituted after the initial termination and the six months period expired before any suits were filed. Thus, these four cases fall squarely within the Second Circuit's rule and cannot possibly be considered in conflict. In the other three cases (Simmons, McLean

and Spratley[8]), payments were terminated without controversion and the appropriate forms filed and thereafter six months expired before suits were filed. However, in these cases for one reason or another, the payments were later resumed — a "stop-start" situation.

Thus, it is by no means clear that even in these three cases that there would not be informal awards under the Second Circuit's rule. Once compensation terminates, the six months period begins to run, and later changes in the medical condition of the longshoremen should not alter this fact. Otherwise, there would be confusion between the longshoremen and their employers as to who had the right to file a suit to recover damages and recoup the compensation benefits.[9] Therefore, it is seen that the holding in the

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[8] Spratley's present federal court case was also filed more than six months after a formal award. Shipowner produced persuasive law that an earlier state court suit voluntarily non-suited by longshoreman did not toll the six month statute, but the Fourth Circuit in view of its broad ruling, did not address this issue.

[9] Dating the award from a formal order would not allieviate this situation. There can always be subsequent orders. See §22 of the Act (33 U.S.C. §922).

cases of four petitioners present no conflict at all with Second Circuit. The other three apparently present no conflict, and are at best not in a posture to determine whether or not there would be any conflict.

The Fourth Circuit in these cases could easily have affirmed the district court's dismissal based on the principle of the last payment of compensation having been made. The Fourth Circuit in enuniciating its first payment rule, was drawing a bright line for parties in future cases to know exactly when the informal award has been made; however, the Fourth Circuit's statement was overly broad as far as the actual facts in these seven cases and was therefore unnecessary to its decision. Thus, while there may be a divergence of opinion between the Second Circuit's rule, which would allow a "first payment" case to proceed but not a "last payment" one and the rule set out by the Fourth Circuit's in Simmons, there is no conflict between the actual holding in Simmons as it affects the cases under consideration. Simply, none of these cases involved a pure first payment dismissal, and it would appear that

even under the rule of the Second Circuit an assignment has occurred in each of these cases.

Rodriguez was decided only one year ago. Two circuits are now cited to this Court as having issued opinions based on Rodriguez and having expressed views on what constitutes an informal award of compensation in order to trigger the six months' running of the statute under §33(b). These cases, Verderame and Simmons, are more in agreement than disagreement. Certainly there is no disagreement between the principle established in Verderame and its application to the actual facts of the cases involving four of the petitioners herein and it is doubtful if there would be any difference as to the other three. This Court should exercise its discretion and allow the rule on this relatively narrow issue to be fully developed in the various circuits before deciding if it again is necessary to step in so soon and clarify §33 of the Act. "The Court may prefer to defer [the] issue until it can have the benefit of consideration by several lower courts, or until cumulating events provide a better perspective for decision." Wright, Miller, Cooper & Gressman, Federal Practice and Procedure: Jurisdiction §4004 (1977).

POINT II: THERE IS NO CONFLICT IN THE CIRCUITS AS TO REASSIGNMENT.

Petitioners contend that there is a conflict within the Fourth Circuit, and that Simmons conflicts with Third Circuit cases.

As far as the Fourth Circuit conflict is concerned, it should have been solved by a petition for rehearing en banc addressed to the Fourth Circuit. See North Carolina Utilities Commission v. F.C.C., 552 F.2d 1036, 1044-45 and n.8 (4th Cir. 1977). Furthermore, this is not the type of "conflict" envisioned by Rule 19 of the Supreme Court Rules.

The Third Circuit cases cited pre-date the 1959 Amendments to the Act, and this Court's Rodriguez decision.[10] Moreover, two of these cases Johnson v. Sword Line, 146 F.Supp. 940 (E.D. Pa. 1956) aff'd 257 F.2d 541 (3rd Cir. 1958) and Magee v. McNany, 10 F.R.D. 5 (W.D. Pa. 1950), do not deal with voluntary reassignment. They deal with the very issue this Court

[10] Voluntary reassignment was not reviewed in Rodriguez.

did address in Rodriguez – the status of employees' rights after an assignment – and these Third Circuit cases as well as Caldwell, supra, were overruled.

Only one other circuit court case discusses voluntary reassignment. Del Re v. Prudential Lines, Inc., 669 F.2d 93 (2d Cir. 1982), petition for cert. filed, 50 U.S.L.W. 3998.20 (No. 81-2315). There the injured worker filed suit more than six months after he was "awarded" compensation and the defendant moved to dismiss on this ground. Del Re responded by obtaining a letter from his employer's compensation carrier which "ratified" the commencement of Del Re's action in his own name. The issue was whether this purported reassignment was valid. The district court found it was pursuant to Rule 17(a), F.R.C.P., on the ground that the carrier was the real party in interest.

The Second Circuit disagreed and reversed stating, "To give effect to such a 'ratification' would defeat the purposes of the Act as amended in 1959 and 1972." Del Re at 97. It was held that after the time

period of §33(b) had expired, Rodriguez required that the employer, and only the employer, could sue the third party.

The Fourth Circuit reached the same conclusion and the same result in the cases under consideration.

Here two of the assignees purportedly reassigned their rights back to the employee. In Bandy the employer's compensation carrier wrote a letter on June 5, 1981, reflecting a decision "to assign (the plaintiff), the right to proceed with this third-party action." Bandy II (53A). In Caldwell the employer's compensation carrier executed an "assignment" which is essentially an affidavit purporting to transfer its lien[11] rights to Charles Caldwell.

In view of this Court's holding in Rodriguez, supra, at 101 S.Ct. 1955 that there was neither a substantive nor procedural right for involuntary reassignment as was discerned in Caldwell, supra, the district court below refused to sanction this "end run"

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[11] A true assignment (or reassignment) would transfer all the employers' right of action, not just its lien rights. See 33 U.S.C. §933(d).

around the statutory scheme (60A-61A). The Fourth Circuit agreed that Rodriguez compelled it to overrule its earlier Caldwell decision on this point (43A-45A).

Thus, we are left with two - and only two - circuit courts of appeals decisions after Rodriguez and both hold that voluntary or express reassignment is not permitted.

CONCLUSION

This Court should not grant Certiorari because there is no conflict in the circuits on the issues involved, and no substantial question of federal law has been raised.

Respectfully submitted,

John R. Crumpler, Jr.
Counsel for Respondents,
Sea-Land Services, Inc. and
Bank Line, Ltd.

Carter B. S. Furr
Counsel for Respondent
Hellenic Lines, Ltd.

John B. King, Jr.
Counsel for Respondents,
CIA Transatlantic Espanola,
S.A.,
Ogden Sea Transport, Inc.
Compania Crasatlantica
Espanola, S.A. and
Companhia De Navegacao
Maritima Netumar

STATEMENT REQUIRED BY RULE 28.1

1. Respondent, Sea-Land Service, Inc., is a subsidiary of R. J. Reynolds Industries, Inc.

2. Respondent, Bank Line, Ltd., is a corporation organized under the laws of Great Britian and is not a subsidiary, affiliate or parent of any other corporation.

3. Respondent, Hellenic Lines, is a corporation organized under the laws of Greece and is not a subsidiary or parent of any other corporation. Universal Cargo Carriers Corp. and Transpacific Carriers Corp., which are Panamanian corporations, are affiliates of Hellenic Lines.

4. Respondent, Ogden Sea Transport, Inc., is a subsidiary of Ogden Marine, Inc.; Ogden Marine, Inc. is a subsidiary of Ogden Corp.

5. Respondent, Compania Crasatlantica Espanola S.A., is a corporation organized under the laws of Spain and is not a subsidiary, affiliate or parent of any other corporation.

6. Respondent, Companhia De Navegacao Maritima Netumar, is a corporation organized under the laws of Brazil and is not a subsidiary, affiliate or parent of any other corporation.

7. Respondent, Cia Transatlantic Espanola S.A., is a corporatioin organized under the laws of Spain and is not a subsidiary, affiliate or parent of any other corporation.

CERTIFICATE OF SERVICE

I, John B. King, Jr., certify that on August 11th, 1982, forty (40) copies of this BRIEF IN OPPOSITION were mailed or delivered to the Clerk, United States Supreme Court and three (3) copies were mailed to:

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720 Atlantic National Bank Bldg.
Norfolk, Virginia 23510
Counsel for petitioners,
Melvin Bandy, Fred L. Spratley,
Thomas E. MCLean, Charles A.
Caldwell, Wallace Curry and
Wilbert C. Harold

and

Ralph Rabinowitz, Esquire
309 W. Bute Street
Norfolk, Virginia 23510
Counsel for petitioner,
Pearlie Simmons

John B. King, Jr.

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82-56

Docket No.

Office - Supreme Court, U.S.
FILED
NOV 5 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1982

PEARLIE SIMMONS,
Petitioner

v.

SEA-LAND SERVICES, INC.,
Respondent

MOTION TO RECONSIDER DENIAL OF PETITION FOR CERTIORARI

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John H. Klein
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Counsel for Petitioners

SEE INSIDE COVER FOR ADDITIONAL CASES

Docket No.

In the Supreme Court of the United States

MELVIN BANDY, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
Petitioners,

v.

BANK LINE, LTD.,
Respondent.

FRED L. SPRATLEY, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

HELLENIC LINES, LTD.,
Respondent.

THOMAS E. McLEAN, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

CIA TRANSATLANTIC ESPANOLA, S.A.,
Respondent.

CHARLES A. CALDWELL, and
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

OGDEN SEA TRANSPORT, INC.,
Respondent.

Docket No.

In the Supreme Court of the United States

WALLACE CURRY, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

COMPANIA CRASATLANTICA ESPANOLA, S.A.,
Respondent.

WILBERT C. HAROLD, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
THE HARTFORD ACCIDENT INDEMNITY INSURANCE COMPANY,
Petitioners,

v.

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Respondent.

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IN THE
SUPREME COURT OF THE
UNITED STATES

Pearlie Simmons,
Petitioner
v.
Sea-Land Services, Inc.,
Respondent.

Melvin Bandy, for and on behalf of
himself, individually, and
American Mutual Insurance Company of
Boston,
Petitioners,
v.
Bank Line, Ltd.,
Respondent.

Fred L. Spratley, for and on behalf of
himself, individually, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
Hellenic Lines, Ltd.,
Respondent.

Thomas E. McLean, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
CIA Transatlantic Espanola, S.A.,
Respondent.

Charles A. Caldwell, and
Commercial Union Insurance Company,
Petitioners,
v.
Ogden Sea Transport Inc.,
Respondent.

Wallace Curry, and
Atlantic and Gulf Stevedores, Inc.,
Petitioners
v.
Compania Crasatlantica Espanola, S.A.,
Respondent.

Wilbert C. Harold, for and on behalf of
himself, individually, and
The Hartford Accident Indemnity
Insurance Company,
Petitioners,
v.
Companhia De Navegacao Maritima Netumar,
Respondent.

MOTION TO RECONSIDER DENIAL
OF PETITION FOR CERTIORARI

Petitioners move the Court pursuant to Rule 58 of the Rules of the Supreme Court of the United States to rehear the petition for certiorari to the United States Court of Appeals for the Fourth Circuit previously filed in this matter. This Court in an order dated October 12, 1982 denied certiorari, with a dissent by Justice White, with whom Justice O'Connor joined.

The petition for certiorari sought review by this Court of the Court of Appeals for the Fourth Circuit's decision that acceptance of the first payment of workmen's compensation by a longshoreman constituted "acceptance of compensation under an award in a compensation order" so as to trigger the six month period within which a longshoreman could sue a shipowner. The petition for certiorari pointed out the difference between that holding by the Fourth Circuit and the holding of the Court of Appeals for the Second Circuit which held that the six month period within which a longshoreman must sue a third party begins only when the total amount of compensation benefits to be received by the injured worker is fixed, either by order, stipulation of the parties, or informal award. Verderame v. Torm Lines, 670 F.2d 5, (2d Cir.

1982); D'Amico v. Compania de Nav. Mar. Netumar, 677 F.2d 249 (2d Cir. 1982).

In addition, petitioners filed a supplement to the petition for certiorari which consisted of the decision of the Court of Appeals for the Sixth Circuit in Duris v. Erato Shipping Inc., 684 F.2d 352 (6th Cir. dec. July 16, 1982). In Duris, the court explicitly held that "the mere receipt of compensation benefits under the Act does not trigger the assignment provision of section 33(b)." Id. at 355. Thus, at the time of this Court's decision on the petition for certiorari filed herein, there were in fact three separate Courts of Appeals decision, which significantly differed in determining when a longshoreman could sue a third party shipowner.

A petition for certiorari was filed with this Court in Duris sub nom.

Pallas Shipping Agency v. Duris, No. 82-502, on September 20, 1982, 51 U.S.L.W. 3260. As of the date of this petition for rehearing, no decision has yet been made by this Court on the Duris petition for certiorari.

The filing of the petition for certiorari in Duris is an intervening circumstance of substantial effect. Both Duris and the instant petition seek to have this Court determine whether mere receipt of workmen's compensation benefits by a longshoreman is sufficient to trigger the statutory assignment provision of 33 U.S.C. §933(b). This is an important question of maritime law which should be resolved by this Court. The decisions of the Sixth and Second Circuits are distinctly contrary to the decision of the Fourth Circuit. This Court should resolve the question by establishing a uniform national

interpretation of the Longshoremen's Act.

Congress clearly intended the Longshoremen's Act to be applied uniformly throughout the country. The Senate Report which accompanied the 1972 Amendments to the Longshoremen's Act states:

> "Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law." S. Rep. 92-1125, 92d Cong., 2d Sess.

The several petitioners here, longshoremen injured working on board ships, are barred from recovering damages from the shipowners. Petitioners here would be entitled to sue under the Sixth Circuit's holding in

Duris and under the Second Circuit's holding in Verderame and D'Amico. Since this Court may well decide to review the Duris decision, this Court should retain the instant petition on its docket so the appropriate uniform and national standard can be applied to the instant petitioners as well.

In addition two state appellate courts have rendered decisions which reject the holding of the Fourth Circuit sought to be reviewed herein. The text of these two decisions is attached hereto as an Appendix. These two decisions were not called to this Court's attention previously, for they were published subsequent to the petition for certiorari. In Grey v. Rederi A/S Myren, dec. July 1, 1982, the New York Appellate Division, First Department specifically rejected the

Simmons holding and adhered to the Second Circuit's Verderame holding.

More importantly, in Spoto v. Washington Metropolitan Area Transit Authority, No. 1265, dec. Sept. 8, 1982, the Court of Special Appeals of Maryland held that "mere acceptance of compensation, absent an award, does not effect a statutory assignment of the injured party's claim." Thus a state court of appeals within the Fourth Circuit geographic area has reached a decision directly contrary to the Fourth Circuit's decision in Simmons. This means longshoremen suing in Maryland state courts are able to bring suits which longshoremen suing in federal courts in the Fourth Circuit are barred from bringing. Longshoremen suing in Baltimore, Maryland in federal courts have different more restricted rights than longshoremen suing in Baltimore,

Maryland state courts. This is clearly not in accordance with the expressed Congressional intent that there be a uniform application of the Longshoremen's Act.

Additionally, longshoremen in Norfolk, Virginia may also face this anomalous situation. Longshoremen suing in federal courts in Norfolk are governed by the Fourth Circuit's Simmons holding that any acceptance of compensation benefits starts the six month period. However, the Virginia Supreme Court has accepted for review the question of whether receipt of compensation benefits under the Longshoremen's Act without entry of a formal award in a compensation order filed by the Deputy Commissioner serves to trigger the assignment provision. Ridley v. American Export Lines, Rec. No. 801959 (appeal awarded Sept. 15,

1981). It is clearly inappropriate for longshoremen to have one period within which to sue in state courts and another lesser period within which to sue in the federal courts, all based upon the same statute. Yet that is the precise result in Maryland and it may well be the result in Virginia.

Longshoremen now also have different rights in federal courts depending upon the geographic area within which they are injured. Longshoremen injured in the Great Lakes (Six Circuit) and the North Atlantic (Second Circuit) are able to bring suits against shipowners which longshoremen injured in the mid-Atlantic (Fourth Circuit) are unable to bring. Such differing results in application of the same federal statute are clearly inappropriate. The situation cries out for this Court to exercise its review

authority and to create and apply a uniform interpretation of the Longshoremen's Act.

CONCLUSION

Because there have been substantial intervening circumstances--the Sixth Circuit's Duris decision, the filing of a petition for certiorari in Duris, the Maryland State Court decision contrary to the Fourth Circuit's Simmons holding, and the New York State Court decision specifically rejecting Simmons and adhering to the Second Circuit's Verderame decision--petitioners pray this Honorable Court to reconsider is decision to deny certiorari herein, to consider the petition filed herein in conjunction with that filed in Duris,

and to grant certiorari to review the Fourth Circuit's Simmons decision.

Respectfully submitted,

By 
John H. Klein

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Ralph Rabinowitz
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Counsel for Petitioners.

CERTIFICATE OF SERVICE

I John H. Klein certify that on or before November 5, 1982, 40 copies of this Petition for Certiorari were mailed or delivered to the Clerk, United States Supreme Court and three copies were mailed to:

John B. King, Jr., counsel for Ogden Sea Transport, Inc., Companhia de Navegacao Maritima Netumar, Compania Crasatlantica Espanola, S.A, 2050 Virginia National Bank Bldg., One Commercial Place, Norfolk, Virginia 23510;

Carter B.S. Furr, counsel for Nakliyati, Hellenic Lines, Ltd., P.O. Box 1039, Norfolk, VA 23501;

John R. Crumpler, Jr., counsel for Bank Line and Sea-Land Services, P.O. Box 119, Norfolk, VA 23501.

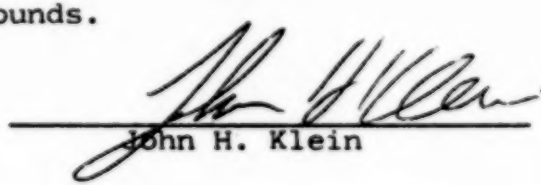
and Mr. Ralph Rabinowitz, counsel for Pearlie Simmons, P.O. Box 332, Nofolk, VA 23514.



John H. Klein

CERTIFICATE

I John H. Klein counsel for petitioners certify that the petition for rehearing filed herein is presented in good faith and based upon intervening circumstances of substantial effect. I certify that the petition is limited to those grounds.



John H. Klein

APPENDIX

WAVERLY GRAY, Plaintiff-respondent, v. REDERI A/S MYREN, Defendant-appellant.

Decided July 1, 1982 Before Murphy, P.J.; Kupferman, Sandler, Carro and Markewich, JJ.

Appeal by the defendant-appellant from so much of an order of the Supreme Court, New York County (Wallach, J), entered on September 26, 1980 as denied defendant's motion for summary judgment.

John M. Toriello, of counsel (Thomas F. Molanphy with him on the brief; Haight, Gardner, Poor & Havens, attorneys) for the defendant-appellant.

Howard Fishkin, of counsel (Zimmerman & Zimmerman, attorneys) for the plaintiff-respondent.

Markewich, J. - Plaintiff was employed as a longshoreman by International Terminal Operating Co., Inc. While assisting in ITO's stevedoring operations on board defendant's vessel, he sustained injuries to his right arm and left leg

on November 30, 1972. Pursuant to the Longshoremen's & Harbor Workers' Compensation Act (33 U.S.C. sec. 901, et seq.), plaintiff filed a Worker's Compensation claim with the United States Department of Labor. ITO did not controvert the claim; rather, it paid compensation, without an award, from Dec. 1, 1972 through Dec. 18, 1972. At plaintiff's request, the Labor Department conducted a conference to consider the claim for additional compensation for temporary total disability through March 26, 1973. This resulted in a "Memorandum of Informal Conference" dated May 8, 1973, which directed payment of temporary total disability from Dec. 1, 1972 through March 25, 1973. On May 18, 1973, ITO paid this award. Plaintiff then presented a second claim in which he sought compensation for permanent

partial disability. On May 6, 1974, the Labor Department issued a document awarding plaintiff $2,951.26 based upon its finding that he had a 2½ percent permanent partial disability of the right arm and a 5 percent permanent partial disability of the right leg. ITO duly paid this additional award.

This personal injury action against the vessel's owner was commenced on April 11, 1974, one month before the May 6, 1974 award for permanent partial disability and thirteen months after the May 8, 1973 award for temporary total disability. Relying upon 33 United States Code, section 933(b), which requires that an action against a third person must be commenced within six months after acceptance of a compensation award, defendant moved for leave to serve an amended answer and for summary judgment hereon on the ground

that six months had elapsed since plaintiff's acceptance of the May 8, 1973 award. Judge Wallach granted leave to amend the answer but denied summary judgment since the May 6, 1973 award of additional compensation implied that the recommendation in the May 8, 1973 memorandum was interim in nature, so that the six-month statute of limitations had not begun to run from the date of the first award.

Defendant's appeal from denial of summary judgment raises the question of whether the May 8, 1973 memorandum awarding temporary total disability constitutes an "award in a compensation order" so as to start the running of the six-month limitation contained in section 933(b). Although plaintiff has not cross-appealed that part of the order which granted defendant leave to amend its answer, our search of the

record reveals that there was no merit to the proposed defense. Leave to amend should therefore not have been granted (CPLR 3212[b]; Siegel, New York Practice sec. 282, page 339.)

Section 905(b) of the Act authorizes an injured person to bring an action against the vessel owner as a third party. That right is circumscribed by Section 933:

"(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

"(b) Acceptance of such compensation under an award in a

compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." [Emphasis added]

The award rendered in the May 8, 1973 memorandum was for the sole purpose of compensating plaintiff for his temporary total disability. That was the only issue addressed at the informal conference. Such an interim payment does not start the time period running under the Act. "The legislative history of the statute, as outlined by the Supreme Court and ourselves in Rodriguez,[1] makes clear that Congress's

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[1] Rodriguez v. Compass Shipping Co., Ltd., 617 F.2d 255 (2d Circuit 1980) affirmed, - U.S.-, 101 S.Ct. 1945, 68 L.Ed.2d 472

purpose was to provide the injured longshoreman, after he knows what his award of compensation benefits will be, with a period of six months within which to decide whether in light of all of the circumstances, including the settlement arrived at with the employer without proof of any fault, to bring an action against a third party seeking damages based on its negligence." (Verderame v. Torm Line, A/S, 670 F.2d 5, 6-7 [2d Circuit 1982]). Plaintiff longshoreman could not possibly appraise the full nature and extent of his injuries until he knew that total amount of compensation he would ultimately receive from his employer; he did not gain this knowledge until May 6, 1974, the date the Labor Department issued its additional award for permanent partial disability, which supplemented and completed the first award covering

temporary total disability. "To hold otherwise would be to force the longshoreman to proceed in the dark." (Id. at page 7.) the mere fact that plaintiff accepted payment under the May 8, 1973 memorandum cannot serve to transform the interim award into "an award in a compensation order" sufficient to trigger the six-month period set forth in section 933(b)

We note that the Fourth Circuit has determined that "the focus [of an award] should properly be upon some act of ratification of compensation, whether formal or informal, and the subsequent acceptance of compensation by the claimant." (Liberty Mutual Insurance Co. v. Ameta & Company, 564 F.2d 1097, 1102.) That circuit has also ruled that an award in a compensation order is created by the completion of three events: "(1) the employer, having not

contravened its liability, initiated compensation payments to the longshoreman; (2) the deputy commissioner files the employer's notice that compensation payments have been initiated; and 93) the longshoreman accepts any of the payments." (Simmons v. Sealand Services, Inc., Docket No. 81-1808.) Such an interpretation of the rights provided an injured longshoreman who is covered under the Act runs counter to the very policy and purpose of the Act since it would force an injured worker to institute this third-party personal injury action within six months of acceptance of any payment, no matter how small, and despite the fact that only a minimal portion of the injuries may be covered under that award. We adopt the Second Circuit's interpretation in Verderame, consistent as it is with the United States Supreme

Court's decision in Rodriguez. The Fourth Circuit's concern with undue delay of an employee in seeking access to relief gives disproportionate weight to a comparatively brief period. The act has its own built-in safeguards; it is unnecessary for the courts to go further in order to protect vessel owners and employers at the expense of injured longshoremen.

Plaintiff having commenced this action within six months of the May 6, 1974 award when he was first advised of the full nature and extent of his injuries and the amount of compensation he would receive therefor, this action cannot be barred by the statute of limitations. Accordingly, leave to amend the answer should not have been granted, the defense contained therein being insufficient as a matter of law.

The order, Supreme Court, New York County (Wallach, J.), entered Sept. 26, 1980, should be modified, on the law and the facts in the exercise of discretion, to the extent of denying the motion for leave to serve and file an amended answer, and otherwise affirmed, without costs and without disbursements.

All concur.

Reported In the Court of Special Appeals of Maryland, No. 1265, September Term, 1981.

Nelson Spoto, et al., v. Washington Metropolitan Area Transit Authority, et al.,
Opinion by Moore, J., Filed September 8, 1982.

The question presented here is whether the Circuit Court for Prince George's County (Femia, J.) correctly granted summary judgment for the appellee-defendant in a personal injury suit on the ground that a federal six-month period of limitations applied, and not Maryland's three-year statute. We find error and vacate the judgment.

I.

Nelson Spoto, an architect, was injured on January 14, 1976, while working for an architectural firm on a Metro site in Prince George's County. The employer's insurer, Continental Casualty Company (CNA) paid him workers'

compensation benefits between February 1976 and December 1977.

On January 11, 1979, three days before the three-year statute of limitations expired, Mr. Spoto filed a negligence action against Washington Metropolitan Ara Transit Authority (WMATA) and others. The suit represented the personal claims as well as the subrogated interest of CNA.

On the day of trial, the defendants moved for summary judgment contending that Spoto was barred by a six-month limitations period contained in the Longshoremen's and Harbor Workers' Act[1] 33 U.S.C. §933(b) (1976 ed.), which reads as follows:

> "Acceptance of such [workers'] compensation under an award in

[1]Mr. Spoto's claim for compensation was brought pursuant to §36-501, et seq., of the District of Columbia Code. By making such a claim, he became subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act which has been made applicable to the District of Columbia.

a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award." (Emphasis added.)

II

The motion of WMATA for summary judgment was made orally in open court, when the case was called for trial. Counsel for WMATA informed the court that "rather than go through lengthy introduction of exhibits" in support of the motion, he could establish his case "in two minutes through the plaintiff, Mr. Spoto."

The only relevant facts adduced in Mr. Spoto's very brief appearance on the witness stand were (a) that CNA paid him a total of "nine thousand some dollars," beginning approximately one month after

the accident and (b) that Mr. Spoto accepted the payments.

As we note from the simple, direct language of §339b) quoted above, it was incumbent upon the defendants to show more than the payment and acceptance of workers' compensation payments. Only acceptance of such compensation

- under an award
- in a compensation order
- filed by the Deputy Commissioner or [Benefits Retirement] Board

triggers an assignment to the employer, unless the person entitled to compensation commences an action "within six months after such award. (Emphasis added.)

The record below is bereft of facts pertaining to an award. This was appellees' burden. They failed to sustain it and were not entitled to summary judgment. The lower court erred

in its conclusion that acceptance of compensation paid by CNA triggered an assignment and the operation of the short statute of limitations. The case of Rodriguez v. Compass Shipping Co., 451 U.S. 596, 101 S.Ct. 1945 (1981), upon which the defendants and the court relied, does not support such a conclusion; and it is at variance with the meaning of §33(b) as shown by the legislative history of the section as set out in Rodriguez.

In Rodriguez the Court assumed for the purposes of the decision that the plaintiff had "accepted compensation from his employer pursuant to an award in a compensation order." Id. at 1948, n.3. Indeed, at n.16, id. at 1951, the House Report makes clear that there is a significant difference between "acceptance of compensation and "acceptance of...compensation under an

award in compensation." The Court noted that, prior to 1938, acceptance of compensation, without more, operated as an assignment. 44 Stat. 1424, 1440 (1927); but by an amendment in 1938 the employee was relieved of the risk of having a mere acceptance of compensation operate as an immediate assignment of his cause of action against a third party, 52 Stat. 1164, 1162[2]. Id. The 1938 procedural change, the Court stated, id. at 1951, was "designed to protect the employee from the harsh consequences of an improvident election."[3]

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[2]In 1959, §33(b) was amended to its present form, affording the employee a six-month period, after receiving a statutory compensation award, within which to sue the third party and prevent an assignment.

[3]The court quotes extensively from the House Committee Report on the 1938 amendment concerning the purpose of the measure, i.e., to "remove possible cause of complaint" that mere acceptance of compensation effect an assignment to the employer. Rodriguez v. Compass Shipping

We think it is clear that mere acceptance of compensation, absent an award, does not effect a statutory assignment of the injured party's claim unless suit is filed in six months. Neither the undisputed facts nor the applicable law supported the grant of summary judgment in this case. See Theodore v. Moore McCormack Lines, Inc., 516 F.Supp. 25 (S.D.N.Y. 1981); Dunbar v. Retla Steamship Co., 484 F.Supp. 1308 (E.D. Pa. 1980).

JUDGMENT VACATED; CASE REMANDED FOR TRIAL: APPELLEES TO PAY THE COSTS.

Co., 451 U.S. 596, 101 S.Ct. 1945, 1951 (1981).

Supreme Court, U.S.
FILED
JAN 6 1983
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CLERK

Docket No. 82-56

In the Supreme Court of the United States

October Term, 1982

PEARLIE SIMMONS,
Petitioner

v.

SEA-LAND SERVICES, INC.,
Respondent

RESPONDENTS' BRIEF IN RESPONSE TO MOTION TO RECONSIDER DENIAL OF PETITION FOR CERTIORARI

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SEE INSIDE COVER FOR ADDITIONAL CASES

Docket No.

In the Supreme Court of the United States

MELVIN BANDY, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
Petitioners,

v.

BANK LINE, LTD.,
Respondent.

FRED L. SPRATLEY, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

HELLENIC LINES, LTD.,
Respondent.

THOMAS E. McLEAN, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

CIA TRANSATLANTIC ESPANOLA, S.A.,
Respondent.

CHARLES A. CALDWELL, and
COMMERCIAL UNION INSURANCE COMPANY,
Petitioners,

v.

OGDEN SEA TRANSPORT, INC.,
Respondent.

Docket No.

In the Supreme Court of the United States

WALLACE CURRY, and
ATLANTIC & GULF STEVEDORES, INC.,
Petitioners,

v.

COMPANIA CRASATLANTICA ESPANOLA, S.A.,
Respondent.

WILBERT C. HAROLD, FOR AND ON BEHALF OF HIMSELF, INDIVIDUALLY,
and
THE HARTFORD ACCIDENT INDEMNITY INSURANCE COMPANY,
Petitioners,

v.

COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
Respondent.

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DOCKET NO. 82-56

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

Pearlie Simmons,
Petitioner
v.
Sea-Land Services, Inc.,
Respondent.

Melvin Bandy, for and on behalf of
himself, individually, and
American Mutual Insurance Company of
Boston,
Petitioners,
v.
Bank Line, Ltd.,
Respondent.

Fred L. Spratley, for and on behalf of
himself, individually, and
Atlantic & Gulf Stevedores, Inc.,
Petitioners,
v.
Hellenic Lines, Ltd.,
Respondent.

Thomas E. McLean, and
Atlantic Gulf Stevedores, Inc.,
Petitioners,
v.
CIA Transatlantic Espanola, S.A.,
Respondent.

Charles A. Caldwell, and
Commercial Union Insurance Company,
Petitioners,
v.
Ogden Sea Transport, Inc.,
Respondent.

Wallace Curry, and
Atlantic and Gulf Stevedores, Inc.,
Petitioners
v.
Compania Crasatlantica Espanola, S.A.,
Respondent.

Wilbert C. Harold, for and on behalf of
himself, individually, and
The Hartford Accident Indemnity
Insurance Company,
Petitioners,
v.
Companhia De Navegacao Maritima Netumar,
Respondent.

BRIEF IN RESPONSE TO MOTION TO

RECONSIDER DENIAL OF PETITION FOR CERTIORARI

The Petitioners' motion adds nothing to its petition for writ of certiorari which was denied by this Court on October 12, 1982. The motion emphasizes Duris v. Erato Shipping, Inc., 684 F.2d 352 (6th Cir. 1982) decided before certiorari was here denied. Additionally, the Sixth Circuit decision was submitted by the Petitioners in a Supplemental Appendix thirty days before the Court denied certiorari.

Nevertheless the Respondent is aware that this Court has granted certiorari in Duris, sub nom Pallas Shipping Agency v. Duris, 103 S.Ct. 371, and hence it requires analysis. Longshoreman Joseph Duris was injured while working on board a vessel in May, 1975. Shortly after his injury, he began to receive voluntary payments from his employer under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S. C.A. 901, et seq., and these benefits were paid until April 26, 1977, at which time his employer filed form LS-208 entitled "Compensation Payment Stopped or Suspended" with the deputy commissioner. On April 8, 1980, more than six months after the noncontested termination of compensation benefits, the action in question was instituted. The Sixth Circuit apparently misunderstood the shipowner's argument because at page 353 it notes that "Pallas argues that Duris' acceptance of compensation in May, 1975, triggered §33 and its short statute of limitations . . ." But according to the question presented for review in the Petition for Certiorari, the shipowner in Duris takes the position that the "award" occurred not by virtue of the initial

acceptance of compensation by the longshoreman in May, 1975, but by the termination of benefits and the filing of form LS-208 in April, 1977. That is, Pallas maintains the award occurred at the last payment.

In the final analysis, Duris rests on the proposition that only if a compensation claim is controverted can there be a true "award" within the meaning of Section 933(b). This is based on the erroneous notion that only in a controverted case can a longshoreman become cognizant of the assignment and the resulting consequences to his third-party remedies. No other Circuit Court has adopted such a view.

The rule laid down by the Fourth Circuit in Simmons[1] is the better reasoned approach and should be adopted by this Court. However, under the peculiar facts of the present cases the approach taken by the Second Circuit also requires that this Court uphold the dismissal of the claim. The Second Circuit's view of when an award occurs is best expressed in Verderame v.

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[1] The Sixth Circuit did not cite Simmons in its Duris decision.

Torm Lines, 670 F.2d 5, 6-7 (2d Cir. 1982), wherein the Court stated:

> "The legislative history of the statute, as outlined in the Supreme Court and ourselves in Rodriguez, makes clear that Congress's purpose was to provide the injured longshoreman, after he knows what his award of compensation benefits will be, with a period of six months within which to decide whether in light of all the circumstances, including the settlement arrived at with the employer without proof of any fault, will bring an action against a third party seeking damages based on its negligence. The longshoreman cannot be expected to make an intelligent decision of this issue until he is in a position to appraise the full nature and extent of his injuries and the shipowner's negligence, and until he knows the total amount of compensation which he can be sure of receiving from the employer or its insured. To hold otherwise would be to force the longshoreman to proceed in the dark. On the other hand, once he is armed with information as to the total benefits he will receive from the insured, he can, with knowledge of the seriousness of his injuries and the extent of the shipowner's negligence, intelligently decide whether an action for damages against a shipowner would be likely to yield him any recovery over and above the compensation benefits plus the fee he would receive to pay his attorney. For these reasons we hold that until the amount of compensation benefits to be fixed, either by order, stipulation of the parties, or informal award, there cannot be an '[a]cceptance of compensation

> under an award in a compensation order' within the meaning of §33(b) of the Act." (Emphasis Supplied).

Thus, the Second Circuit adopts the principle of Liberty Mutual Insurance Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977), on which the Fourth Circuit relied in rendering the Simmons decision to the effect that if the compensation payments have terminated and six months thereafter expires before suit is filed, then the suit for damages will be barred.

> "Similarly, in Liberty Mut. Ins. Co. v. Ameta & Co., 564 F.2d 1097 (4th Cir. 1977), relied upon by Torm, although there was no entry of a formal award, not only had the total amount of the compensation benefits payable by the insurer been agreed upon and paid, but compensation had been 'terminated' before an action against the shipowner (in that case by the employer) was commenced." (Emphasis added). Verderame at 7.

To the extent the Sixth Circuit reads Liberty Mutual Insurance Co. v. Ameta & Co., as a first payment case, it is in error. In Liberty Mutual compensation benefits terminated and an LS-208 was filed more than six months before suit was filed. Id. at 1101, 1103.

The Simmons cases are all squarely within the holding of Liberty Mutual and the Second Cirucit's Verderame ruling – all being "last payment" cases. The amount of compensation was fixed when Messrs. Simmons, Bandy, Spratley,[2] McLean, Caldwell, Curry and Harold accepted what they then believed to be their last compensation payment. Therefore, clearly there is no conflict between Liberty Mutual/Simmons and Verderame.

Furthermore, inasmuch as the Sixth Circuit never considered the "last payment - fixed compensation" rationale, it cannot be said to truly conflict with the decisions in the Second and Fourth Circuits.

CONCLUSION

The only basis which Petitioners assert in support of their Motion to Reconsider is the decision of the Sixth Circuit in Duris. However, this decision was cited to the Court before the Petition for Certiorari

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[2] In Spratley benefits were paid pursuant to a compensation order and the action was not commenced until more than six months after the Order was filed.

was denied and does not constitute substantial intervening circumstances. Moreover, the Motion to Reconsider only relates to Issues I in the Petition for Certiorari and not Issue II (whether the employer may voluntarily reassign the right to sue to the longshoreman) and if the Motion is granted, it should only be granted as to Issue I in the Petition.

Respectfully submitted,

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Maritima Netumar

CERTIFICATE OF SERVICE

I, Hugh S. Meredith, certify that on January 6th, 1983, forty (40) copies of this BRIEF IN RESPONSE TO MOTION TO RECONSIDER DENIAL OF PETITION FOR

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